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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

JUDITH A. PAGNUCCO, DONA BARDELLI BAINBRIDGE,
MOLENA A. PORTER, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

These cases arise out of the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. Claims for the wrongful death of passengers are governed by the Warsaw Convention, which limits an air carrier's liability unless the carrier's "wilful misconduct" caused the damage. Petitioners show that the decision below shatters the settled interpretation of the Convention in the areas defined by the first two questions and that the third question arises because the court below has reached out to insulate its revisions to the Convention from further review. These questions are:

1. Can evidence showing the reasons for the carrier's actions be excluded from the jury whose function is to determine whether the carrier is guilty of wilful misconduct as defined in the Warsaw Convention?

2. Does the Warsaw Convention require that plaintiffs prove that the carrier's alleged wilful misconduct caused the aviation accident?

3. May a court of appeals, consistent with the Seventh Amendment right to jury trial, resolve multiple issues of disputed fact and conclude on the basis of its own factual findings that the exclusion of a party's evidence at trial was harmless error?

LIST OF PARTIES

The caption lists the plaintiffs and defendants in the three cases whose judgments were immediately before the court of appeals. The principal issues before the court of appeals involved issues of liability that were common to all of the approximately 225 cases that were consolidated for purposes of trial and appellate review. The plaintiffs in the remaining cases are listed in the footnote.*

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* The plaintiffs in those other cases are: Barbara A. Ahern and Thomas A. Ahern; Paul Aicher; Pamela K. Akerstrom; Carolyn Ammerman; Diane Apfelbaum and John Apfelbaum; Arnold Asrelsky and Hope Asrelsky; William Garretson Atkinson, Jr.; John Thomas Bacciochi; Kenneth Stuart Barclay; David Bell; Melvin Bell; Allen Benello; Susan G. Bennett; Raquel Lopes Benvenuto; Phillip B. Bergstrom; John Berkley and Jean Berkley; Sandra Bernstein Clarren; Stephanie Laskin Bernstein; Robert P. Berrell and Sara S. Berrell; Sharda Bhatia; Florence Bissett; Maggie Boatman; John F. Boland and Jane A. Boland; Marion K. Alderman; Ronald Boulanger and Jeannine Boulanger; Francoise Boyer; Eleanor Hoey Bright; Diana Browner; Patricia A. Brunner; Roy Burman and Linda Ruth Burman; Geraldine G. Buser; Arnold Victor Butler; Brian D. Butler; Katia Cadman; Edmundo Luis Caffarone and Graciela Caffarone; Loulie D. Canady; Salvatore V. Capasso and Betty-Ann Capasso; Anthony J. Cardwell and Barbara A. Cardwell; Leo Cawley; Mary Lou Ciulla; Daniel Edward Cohen and Susan Handler Cohen; Thomas Coker; Leonard Colasanti and Joanne Colasanti; Bernadette Mary Concannon; Alfred Corner; John M. Cory and Doris M. Cory; Margaret C. Coursey; Matthew Coyle and Janice Coyle; M. Victoria Diaz Cummock; Jodie Curry and Thomas L. Stirling, Jr.; Kathryn C. Daniels; Thomas E. Dater; Jane E. Davis; Luisa Della Ripa; Philip M. Di Mauro; Elizabeth Delude-Dix; Dr. Sudhakar Dixit; Perry Dornstein; Noreen C. Doyle; M. T. Ergin; Barbara W. Liberman; Barry John Flick; John M. Flynn; Lori Fondiler; Deirdre Torney Fortune; Georgann Fuller; Garth Gallagher; Susan Gannon; Lynn Koenig Garczynski; Wendy A. Giebler; Elaine Catherine Wright; The Official Solicitor to the Supreme Court of Penderel House, London, England, for the use and benefit of Trudy Ann Felicia Peters; Barbara Richardson; Terri F. Gould; Tatiana Guevorguian; Anthony B. Hall and Philippa W.M. Hall; Paul Halsch; Joseph Hartunian; Helen Engelhardt Hawkins; Shirley J. Herbert and James H. Herbert; June Ruth Hilbert; William W. Hollister and Babette Solon Hollister; Patricia

Mary Booth; William B. Hudson, Paul C. Hudson and Melina Rossi; Anne Hudson; Robert R. Hunt; Bernadette R. Hurst; Nazir Jaafar; Beverly Braniff Jeck; Michael Hourihan; Raymond M. Jermyn, Sr. and Margaret M. Jermyn; Glenn P. Johnson, Jr.; William H. Johnson and Grace Johnson; Allan Joseph Jones and Rosemary Lillian Jones; Rita F. Kelly; Patricia L. Kingham; John C. Parker; Susan M. Kosmowski; Marina M. Kulukundis; Ellen M. Lariviere; Robert Leckburg; Andrea R. Leyrer; Shirley M. Lincoln; Peter Lowenstein and Suse Lowenstein; Barbara Ann Ludlow; Richard E. Mack; Donald Malicote, Sr.; Larry W. Forsythe; Adelaide M. Marek; John Draheim; Patricia Audrey Martin; Stanley Maslowski; Alan M. Davis; Peter M. McCarthy; Carol McCollum; Marjorie G. McKee; Ann McSherry McLaughlin and Ann M. McLaughlin; Eva Lorraine Merrill; Richard Miazga and Anna Maria Miazga; Rhoda P. Miller; Lucille Benfield; Robert Monetti; G. Edward Morgan, Jr.; Walter Gerald Morson; John Frederick Mosey; Siobhan D. Mulroy; Patrick F. Noonan and Nancy Noonan; Georgia Nucci; Eileen T. O'Connor; David William Owen and Mary Elizabeth Thomas; Judith Papadopoulos; Cherry Peirce; Faith Pescatore; Ervin Phillips; Chester D. Phillips; William M. Pitt and Sallie Hughes Pitt; Lisa Platt; Jacob Posen and Bonnie J. Gregge; Suzanne Martin and Langdon W. Harris, III; Florencio Quiguyan; Harshida Schroff; Dr. Shachi Rattan; Yvonna Reeves; Denice H. Rein; Leonard T. Rencevicz; Oregon Rogers; John Frick Root; Meryl Shahun Rosen; Charles M. Rosenthal; Lynne P. Fraidowitz; Jerichem Rubin; Eugene A. Saraceni; Mack Saunders; George W. Wilson and Kate B. Wilson; Franziska Schaüble, Ingrid Höschle, and Petra Scholl; James L. Schlageter; John J. Schultz; Michael A. Scott; Madeline B. Shapiro; M.S. Shastri and Shanthi Shastri; George L. Scheanshang; Catherine Sigal; Patricia J.S. Simpson; Joan C. Smith and Edward F. Smith; Palmer N. Smith; Roosevelt Smith; Thomas O'Gara and Anne O'Gara; Rosemary Stevenson, Thomas Henry O'Gara and Anne O'Gara; Tammy B. Chenoweth; Velma Jean McGuire; Elizabeth Purtell; Donald Stinnett; Mary M. Stratis; Marilyn I. Swan; Herbert Swire and Jane Valerie Swire; Michael Woolf Tager; Tadashi Tanaka and Emi Tanaka; Felix F. Teran; Funteller Thomas and Arva Lee Thomas; Joseph L. Tobin, Jr.; Ivy Ng Trimmer-Smith; Aphrodite Tsairis; Barry J. Valentino, Sr.; Vera van Tienhoven; Shirin Alaghband Vejdany; Gheorghina Vulcu; Michael Waido; Susan E. Walker; Barbara Matthews Weedon; Rosanne Weston; Glendon L. Rafferty; Veda B. Burrell; George H. Williams and Helena A. Williams; Rosemary Mild and James K. Wolfe; Brenda Woods-Ruff; Everett Woods and Ollie Woods; Rose Mary Copeland; and Paul G. Zwynenburg.

RULE 29.1 LISTING

Pan American World Airways, Inc., and Alert Management Systems, Inc. are wholly-owned subsidiaries of Pan Am Corporation. Pan American World Airways, Inc. has the following subsidiaries and affiliates which are not wholly owned: Air Cargo, Inc.; Airline Tariff Publishing Company; Escola Americana de Rio de Janeiro; Honolulu Fueling Facilities Corporation; International Aeradio (Caribbean) Ltd.; Liberian Development Corporation; Manhattan Air Terminal, Inc.; Nigeria Aviation Handling Co.; and Social Immobiliara Norteamericana, S.A.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 LISTING	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
TREATY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
1. Overview	2
2. Plaintiffs' Two Theories of Causation	3
3. Plaintiffs' Theory of Intentional Rule Violation	5
4. The District Court's Exclusion of Pan Am's Defense	6
5. The Opinions of the Court of Appeals	8
REASONS FOR GRANTING THE WRIT	10
I. WHETHER THE CARRIER'S STATE OF MIND IS AN ELEMENT OF WILFUL MISCONDUCT UNDER ARTICLE 25 IS AN IMPORTANT ISSUE DESERVING REVIEW BY THIS COURT	11
A. The Decision Below Conflicts With The Decisions Of Other Circuits And Of The Highest State Courts	11
1. The Established Rule	11

TABLE OF CONTENTS—Continued

Page

2. The Decision Below Conflicts with the Established Rule 13

B. The Decision Below Raises Issues Of Critical Importance To The Administration Of The Warsaw Convention 16

II. WHETHER PLAINTIFFS MAY BE RELIEVED OF THE BURDEN OF SPECIFICALLY PROVING CAUSATION IS AN IMPORTANT ISSUE JUSTIFYING REVIEW BY THIS COURT 19

III. THE MISUSE BY THE COURT OF APPEALS OF THE HARMLESS ERROR DOCTRINE REQUIRES THE SUPERVISION OF THIS COURT 23

1. Helsinki Warning 23

2. Toshiba Warning 24

3. Report by Security Consultants 24

4. Weber's Backdating 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: Page

American Airlines, Inc. v. *Ulen*, 186 F.2d 529 (D.C. Cir. 1949) 12
Belgian Int'l Air Servs. v. *Mandreoli*, 1 Shawcross & Beaumont Av. Rep. VII/601 (Italy, Milan Ct. App. 1974) 17
Berguido v. *Eastern Air Lines, Inc.*, 369 F.2d 874 (3d Cir. 1966), *reh'g denied*, 378 F.2d 369 (1967), *cert. denied*, 390 U.S. 996 (1968) 21
Berner v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) 12-13
Butler v. *Aeromexico*, 774 F.2d 429 (11th Cir. 1985) 11
Chan v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) 10
Cheek v. *United States*, 498 U.S. 192 (1991) 26
Claudio v. *Avianca*, 20 Av. Cas. (CCH), 18,320 (Swiss Fed. Ct. 1987) 17
Complaint of Tecomar S.A., 765 F. Supp. 1150 (S.D.N.Y. 1991) 17
Delgado v. *Pan American World Airways, Inc.*, 16 Av. Cas. (CCH) 18,462 (P.R. 1982) 12
Eastern Airlines, Inc. v. *Floyd*, 499 U.S. 530 (1991) 11, 19
Edmondson v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) 26
Goepp v. *American Overseas Airlines, Inc.*, 117 N.Y.S.2d 276 (App. Div. 1952), *aff'd mem.*, 114 N.E.2d 37 (N.Y.), *cert. denied*, 346 U.S. 874 (1953) 13, 22
Goldman v. *Thai Airways Int'l Ltd.*, [1983] 3 All E.R. 693 (Eng. Ct. App. 1983) 18
Hill v. *United Airlines*, 550 F. Supp. 1048 (D. Kan. 1982) 12
Horabin v. *British Overseas Airways Corp.*, [1952] 2 All E.R. 1016 (Q.B. 1952) 16
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986) 26

TABLE OF AUTHORITIES—Continued

Page

In re Korean Air Lines Disaster, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991) 11, 21-22

Johnson v. *American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987) 11, 21

Korean Air Lines Co. v. *State*, 779 P.2d 333 (Alaska 1989) 12

The Limited Stores, Inc. v. *Pan American World Airways, Inc.*, 600 N.E.2d 1027 (Ohio 1992) 12

Machinenfabrik Kern, A.G. v. *Northwest Airlines, Inc.*, 562 F. Supp. 232 (N.D. Ill. 1983) 12

Maynard v. *Durham & S. Ry.*, 365 U.S. 160 (1961) 26

Onyeanusi v. *Pan American World Airways, Inc.*, No. 88-6967, 1990 U.S. Dist. LEXIS 7368, *reh'g denied*, 767 F. Supp. 654 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992) 12, 21

Ospina v. *Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993) 12

Ouvière v. *Farrugio*, 1980 Revue Française de Droit Aérien 200 (Fr. Cass. Civ. 1re 1980) 20

Pekelis v. *Transcontinental & W. Air, Inc.*, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951) 12

Rymanowski v. *Pan American World Airways, Inc.*, 416 N.Y.S.2d 1018 (App. Div. 1979), *aff'd mem.*, 404 N.E.2d 1336 (N.Y. 1980) 12

S.S. Pharmaceutical Co. v. *Qantas Airways Ltd.*, 1 Shawcross & Beaumont Av. Rep. VII/443 (Austl., N.S.W. Ct. App. 1990) 17

Slocum v. *New York Life Ins. Co.*, 228 U.S. 364 (1913) 26

Sotramat v. *Delaby*, 1967 Eur. Transp. L. 1046 (Belg. Ct. App. 1965) 17

Sweeney v. *Erving*, 228 U.S. 233 (1913) 21

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 466 U.S. 243 (1984) 10

United States v. *Eastern Air Lines, Inc.*, 792 F.2d 1560 (11th Cir. 1986) 14

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Laub*, 385 U.S. 475 (1967)	15
United States v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973)	15
Weiler v. *United States*, 323 U.S. 606 (1945)	26
STATUTES & TREATIES:	
Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. app. § 1502 note	*passim*
Article 17, 49 Stat. 3018	20
Article 20, 49 Stat. 3019	20
Article 25, 49 Stat. 3020	*passim*
The Hague Protocol of 1955, 478 U.N.T.S. 371	16, 17, 18
Montreal Agreement, 49 U.S.C. app. § 1502 note	3, 10, 20
U.S. Dept. of State, Treaties in Force 303-04 (1994)	10
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	3
RULES AND REGULATIONS:	
14 C.F.R. pt. 108	19
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Fed. R. Evid. 103(a)(2)	14
Sup. Ct. R. 10.1(a)	11
OTHER AUTHORITIES:	
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TABLE OF AUTHORITIES—Continued

Page

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Pan American World Airways, Inc. ("Pan Am") and Alert Management Systems, Inc. ("Alert") respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

OPINIONS BELOW

The revised opinion of the court of appeals (App. 1a) is not yet officially reported, but is reported unofficially at 1994 WL 498454.[1] The earlier, vacated opinion of the court of appeals (App. 96a) is reported unofficially at 24

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[1] Citations to "App." are to the Appendices filed with this petition; citations to "J.A." are to the Joint Appendix filed in the court of appeals; and citations to "Tr." are to portions of the trial transcript not contained in that Joint Appendix.

Av. Cas. (CCH) 17,852. The relevant evidentiary rulings of the district court are unreported, but its opinion (App. 176a) denying Alert's motion for judgment as a matter of law is reported at 811 F. Supp. 84.

JURISDICTION

The initial majority opinion of the court of appeals was issued on January 31, 1994 (App. 96a). Petitioners filed a timely petition for rehearing. On September 12, 1994, the court of appeals withdrew its initial majority and dissenting opinions, issued new opinions, and denied rehearing except to the extent provided in the revised majority opinion (App. 1a, 85a). A timely second rehearing petition was denied on October 28, 1994 (App. 87a, 89a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 25(1) of the Warsaw Convention,[2] provides:

> "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

STATEMENT OF THE CASE

1. *Overview.* These cases arise out of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. All 243 passengers aboard the aircraft perished. More than 200 cases for the wrongful death of passengers were brought against Pan Am and Alert, a Pan Am affiliate that had performed certain security func-

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. app. § 1502 note.

tions for Flight 103. Under multidistrict procedures, the cases were consolidated in the Eastern District of New York.

The Warsaw Convention, a treaty of the United States, governs claims for the wrongful death of passengers in international aviation accidents.[3] The Convention, as supplemented by the Montreal Agreement, limits damage awards to $75,000 per passenger,[4] unless, as Article 25 of the Convention provides, the carrier engaged in "wilful misconduct" that caused the disaster. In that event, plaintiffs may recover full compensatory damages.

In a consolidated trial of all passenger claims arising from the Lockerbie disaster, the plaintiffs charged that Pan Am and Alert had engaged in wilful misconduct that had allowed the bomb to be placed aboard Fight 103. After twice reporting itself deadlocked and receiving an *Allen* charge, the jury returned a liability verdict for plaintiffs. Thereafter, the same jury awarded damages totalling almost $20 million in three cases. The judgments in those three cases became the vehicle for appellate review of the liability determination in all 200-plus passenger cases. A panel of the Second Circuit, with Judge Van Graafeiland dissenting, affirmed the liability determination, while setting aside portions of the damages awards. This petition relates only to the liability determination.

2. *Plaintiffs' Two Theories of Causation.* As the dissent points out, no one, except the terrorists, actually knows how the bomb was planted on Flight 103 (App. 55a). In trial, plaintiffs had two theories as to how the bombing was accomplished. According to plaintiffs' prin-

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[3] The district court had federal-question jurisdiction over these cases under 28 U.S.C. § 1331 because the claims arose under a treaty.

[4] The 1929 Warsaw Convention itself limited damages to approximately $8,300 per passenger. The Montreal Agreement, a 1966 agreement among air carriers serving the United States, raised this limit to $75,000. 49 U.S.C. app. § 1502 note.

cipal hypothesis, the bomb was secreted in a Toshiba radio/cassette player that was packed in a suitcase; and the suitcase was carried, without an accompanying passenger, on Air Malta Flight 180 to Frankfurt, Germany, where it was transferred to Pan Am Flight 103.[5] According to this "Air Malta theory" of causation, Pan Am failed to interdict the bomb at Frankfurt (a) because the security screener who allegedly x-rayed the bomb bag overlooked the radio/cassette player when it appeared on his x-ray screen and (b) because Pan Am allegedly did not follow required procedures to identify and hand-search unaccompanied bags (App. 4a-5a).

Plaintiffs' evidence supporting the Air Malta theory was purely circumstantial, and Pan Am challenged it in virtually every respect through cross-examination and rebuttal evidence.[6] Hence, plaintiffs had a second theory of causation.

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[5] The first leg of Flight 103 was from Frankfurt to London, where passengers and baggage were transferred to a larger aircraft for the flight to New York.

[6] Plaintiffs introduced evidence that the bomb bag had contained items of clothing purchased in Malta (J.A. 2445-47). In addition, plaintiffs introduced various baggage records (J.A. 578-83, 744) from different record keepers at the Frankfurt airport that purportedly showed, when examined together, that a bag from Air Malta had been transferred to Flight 103. Plaintiffs also relied on the testimony of a Scottish detective whose analysis supported an inference that the bomb had been in an unaccompanied bag from the Frankfurt-to-London leg of Flight 103 (J.A. 2630-31).

In rebuttal, Pan Am introduced testimony and records from Air Malta showing that there had been no unaccompanied bag on Flight 180 to Frankfurt (J.A. 3358, 3367). Pan Am further contended that the Frankfurt airport's baggage records were so inaccurate and incomplete as to preclude any reasonable inference that the bomb bag had come from Air Malta (J.A. 3603-12). Pan Am, moreover, adduced the testimony of the person who performed the x-ray screening of the bags that had been transferred from other carriers to Flight 103; he testified that there was no radio in the bags that he inspected (J.A. 3388-93). Finally, Pan Am introduced evidence that an unaccounted-for bag that plaintiffs

That second theory of causation did not specify any method for planting the bomb. As plaintiffs' counsel described it to the jury in closing, the theory was that Pan Am's "entire operation was so mindless, so permeated with fault[,] that *however that bag got on the airplane, Pan Am was responsible*" (J.A. 3529 (emphasis added)). Under what might be termed their "*deemed responsible theory*," plaintiffs were permitted to adduce evidence of two types of alleged misconduct by Pan Am: (1) conduct that had nothing to do with the Air Malta theory of the bombing but that did relate to Pan Am's security for Flight 103, and (2) conduct that had nothing to do with Flight 103 but that served as a predicate for arguing that Pan Am must be deemed responsible for the disaster because its security program was based on "fraud" and "deceit" (App. 27a-29a). The district court ruled that Pan Am opened the door to this "deemed responsible" theory of causation, which dispensed with the need to prove any particular theory as to how the bomb was planted, by contesting the Air Malta theory (J.A. 1439-43). In the words of the court of appeals, "[t]he trial judge reasoned that even if the Air Malta theory did not explain the bomb's presence on Flight 103, other pervasive and extensive wilful misconduct by defendants *must have accounted* for the bomb's presence" (App. 29a (emphasis added)).

3. *Plaintiffs' Theory of Intentional Rule Violation.* To implicate Pan Am in wilful misconduct connected to the Air Malta theory, plaintiffs asserted that Pan Am used x-ray to inspect all transfer baggage from other airlines (interline bags) in knowing violation of a Federal Aviation Administration ("FAA") requirement that any unaccompanied bags be hand-searched, *i.e.*, § XV.C.1(a) of the Air Carrier Standard Security Program ("ACSSP").[7]

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contended was the bomb bag was in fact the unaccompanied suitcase of a Pan Am captain (Tr. 5420-43).

[7] Section XV.C.1(a), which was applicable to Pan Am's operations at Frankfurt and London, required it to

Plaintiffs argued that the x-ray procedure would have been permissible *only* if the FAA had issued to Pan Am a written exemption from the ACSSP, which it had not. Plaintiffs also alleged that Pan Am had knowingly adopted this unlawful procedure to save money and to improve on-time performance (*e.g.*, J.A. 2675, 4167-68).

Plaintiffs further charged at trial that Pan Am had lied about obtaining FAA approval of its x-ray procedure. In their case in chief, plaintiffs introduced an internal Pan Am memorandum written by Daniel Sonesen, a Pan Am security official. Mr. Sonesen's memorandum stated that the FAA's director of security, Raymond Salazar, had approved Pan Am's x-ray procedure (J.A. 560). Plaintiffs then introduced testimony by Salazar denying that he had given such approval and charging that Sonesen's written statement was a "falsehood" (J.A. 2052).

4. *The District Court's Exclusion of Pan Am's Defense.* If permitted, Pan Am would have offered testimony by Sonesen and others showing (1) that there was no "falsehood," and (2) that Pan Am had a good faith belief that its x-ray inspection procedure complied with the ACSSP. Pan Am contended, as a matter of law, that it did not need an *exemption* to employ the x-ray procedure because it had in fact obtained an oral *interpretation* from authorized FAA personnel that its x-ray inspection of interline baggage complied with the ACSSP.[8] Pan Am

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"Conduct a positive passenger/checked baggage match resulting in physical inspection or noncarriage of all unaccompanied bags. The carrier may use either physical match or administrative match, but, in either case, it should be done in a way that passengers are aware of the use of the procedures." (J.A. 4017.)

[8] Pan Am's position that it complied with a valid interpretation of the ACSSP was based on testimony showing that Pan Am had performed an administrative passenger/baggage match on all baggage (J.A. 3036, 3088-89, 4375-76, 4474). When inspecting Pan Am's operations at Frankfurt and London, FAA inspectors had

proffered evidence explaining how it had secured that interpretation and why it had continued to believe that the x-ray procedure complied with the ACSSP. It also proffered evidence that the carrier and the FAA were in weekly, if not daily, contact regarding various aspects of the carrier's operations.[9]

In a series of *sua sponte* rulings commencing during plaintiffs' case,[10] the district court ruled that it would exclude all of Pan Am's evidence showing its understanding that the x-ray procedure complied with ACSSP § XV.C.1(a). The trial court reasoned that the evidence was inadmissible because FAA personnel lacked the authority to *interpret* the rule to permit Pan Am's use of x-ray and thus Pan Am was required to obtain a *written*

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also found that Pan Am was performing the administrative match (J.A. 4077, 4082). Such a match could not, however, detect unaccompanied interline bags when no passenger checked in. To deal with this possibility, Pan Am x-rayed all interline bags. Pan Am contended that this procedure complied with the ACSSP by ensuring the "physical inspection" by x-ray of any unaccompanied interline bags.

[9] Daniel Sonesen would have testified that he had approached the FAA in late 1986 or early 1987 to inquire whether x-ray inspection of all interline baggage would be acceptable under the ACSSP and was told that it would (App. 68a). Sonesen also understood Salazar in a later 1987 meeting to confirm that x-ray inspection complied with the ACSSP (J.A. 410). Richard Cozzi, the co-chair of the Pan Am Security Task Force, was proffered to testify that in 1986 the task force recommended x-ray in reliance on Sonesen's report of the FAA's advice (App. 48a-50a). Pan Am also offered evidence showing that the FAA's review of Pan Am's operations before and after the disaster confirmed Pan Am's belief that the x-ray procedure complied with the ACSSP (*e.g.*, App. 72a-73a, 83a; J.A. 3011-13). Finally, with respect to the general relationship between the FAA and the carriers it regulates, Pan Am offered evidence showing that the great majority of advice by the FAA to carriers is oral advice (J.A. 3262-64).

[10] J.A. 2855-57, 2940, 2953-58, 3005-06, 3033-34, 3042-49, 3073-74, 3260, 4368-71. Many of these colloquies are quoted by Judge Van Graafeiland (App. 48a-50a, 70a-79a).

exemption permitting the x-ray procedure. The court also ruled that Sonesen would not be allowed to rebut plaintiffs' charge that he had lied about obtaining FAA approval.

5. *The opinions of the Court of Appeals.* In its initial opinion, the court of appeals, with Judge Van Graafeiland dissenting, affirmed the district court's judgments in all respects (App. 96a, 142a). Six months after Pan Am filed its petition for rehearing, the court of appeals panel withdrew both initial opinions and issued revised opinions (App. 1a, 2a n.1).

In both of its opinions, the panel majority concluded that it was proper for the district court to have admitted evidence of alleged misconduct that was not tied to any hypothesis as to how the bomb might have been planted because that evidence tended to show that "wilful misconduct by defendants must have accounted for the bomb's presence" (App. 125a-28a, 29a-31a). In both opinions, the majority also held that it was proper for the district court, *sua sponte*, to have excluded Pan Am's evidence that it had a good faith belief that the FAA had agreed that Pan Am's x-ray procedure was permitted under the ACSSP. In addition, both opinions held that it was proper for the district court, *sua sponte*, to have excluded Pan Am's evidence rebutting the charge that its security officer (Sonesen) had lied about the FAA's approval.

In affirming the *sua sponte* rulings of the district court, the majority shifted grounds in its revised opinion. Initially, it had held that the district court had correctly excluded proof of Pan Am's belief that it was complying with the ACSSP because that belief was not "objectively reasonable" (App. 119a). In the revised opinion, the majority abandoned its "objectively reasonable" standard (which had no support in prior jurisprudence) and grounded its exclusion instead on supposed limitations to the government-authorization and mistake-of-law de-

fenses, which it borrowed from the criminal law (App. 17a-20a). The majority said that, in light of those criminal law doctrines, the district court could have excluded evidence of Pan Am's actual beliefs as "unnecessarily confusing and perhaps prejudicial" to plaintiffs (App. 21a). As a fallback position, the majority alternatively held that, even if it had been error for the district court to have excluded evidence of Pan Am's reasons for its actions, that error was "harmless" (App. 21a). In resorting to "harmless error," the majority deleted from its second opinion its earlier acknowledgment of "the importance [that] Pan Am's verbal authorization defense might have had to its case were it to have been allowed" in evidence (App. 110a).

Judge Van Graafeiland dissented. He stated bluntly that "Pan Am did not receive a fair trial" (App. 45a). He found that denying Pan Am an opportunity to rebut plaintiffs' charge of lying about FAA approval was "so contrary to established legal precedent and simple justice that it smacked of a due process and Seventh Amendment violation . . ." (App. 70a). Moreover, the dissent found that the majority had fundamentally misstated the standard determining the admissibility of Pan Am's evidence of FAA approval: "The issue was not whether Pan Am violated the regulation; it was whether Pan Am used x-ray screening with knowledge that its use would probably result in injury or in reckless disregard of the probable consequences" (App. 83a).

Judge Van Graafeiland also disputed the majority's harmless error ruling: "We would be blinking reality if we did not hold that the district judge's erroneous rulings were prejudicial" (App. 81a). In particular, he quoted from the trial record "to demonstrate the danger of unquestioned reliance upon my colleagues' often-pejorative statement of facts" (App. 52a), and he said that the majority's vehement denunciation of Pan Am's response

to a security warning is "in the nature of a half-truth" (App. 52a).[11]

REASONS FOR GRANTING THE WRIT

The decision below eviscerates the limitations on carrier liability established by the Warsaw Convention.[12] In direct conflict with numerous decisions of American and foreign courts, the court below redefines and dilutes the two prerequisites for unlimited liability under Article 25 of the Convention: (1) that there be "wilful misconduct" and (2) that this misconduct be the "cause" of the damage. Review is warranted because the court of appeals has fundamentally altered a treaty that is adhered to by at least 120 nations[13] and that aims to provide "uni-

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[11] On November 2, 1994, the clerk of the court sent two memoranda by Judge Van Graafeiland to the parties (App. 91a-94a). These memoranda show that the judge had objected to the court of appeals' procedure for rehearing. From these memoranda, it appears that the court held Pan Am's first petition for rehearing in abeyance while the panel prepared new majority and dissenting opinions; thereafter the entire court, in light of the new opinions, voted against rehearing the case in banc without first allowing Pan Am to seek rehearing on the significant revisions in the new opinions. Because the court had already decided not to rehear the case before Pan Am could file its second petition for rehearing and suggestion for rehearing in banc directed to the new opinions, Judge Van Graafeiland declined to participate further on the ground that any request for another vote by the entire court would be a "futile gesture" (App. 94a).

[12] This is not the first judicial attempt to circumvent the liability limitations in the Convention that this Court has been called upon to correct. In *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984), the Second Circuit had erroneously held that the limitations were unenforceable because there was no longer an official price for gold. In *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the Second and Fifth Circuits had erroneously held that the $75,000 liability limitation established by the Montreal Agreement was unenforceable when the written notice of that limitation had been given in 8-point, rather than 10-point, type.

[13] U.S. Dept. of State, Treaties in Force 303-04 (1994).

formity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 552 (1991).

The decision below also warrants review because it rests on unrestrained appellate fact-finding that violates the Seventh Amendment and that departs so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a).

I. WHETHER THE CARRIER'S STATE OF MIND IS AN ELEMENT OF WILFUL MISCONDUCT UNDER ARTICLE 25 IS AN IMPORTANT ISSUE DESERVING REVIEW BY THIS COURT.

A. The Decision Below Conflicts With The Decisions Of Other Circuits And Of The Highest State Courts.

1. *The Established Rule.* Article 25 of the Convention is "one of the most controversial and litigated provisions in the Warsaw system."[14] Until the decision below, American federal and state courts had held that the carrier's state of mind is the critical ingredient for finding "wilful misconduct" under Article 25. With minor variations in wording, the American courts have defined "wilful misconduct" as the "intentional performance of an act with *knowledge* that the . . . act will *probably result in injury* or damage" or as "the intentional performance of an act in such a manner as to imply *reckless disregard* of the *probable consequences.*" *E.g., Johnson* v. *American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987) (emphasis added; internal quotations omitted). This definition, or its substantial equivalent, has been explicitly embraced by the Ninth, District of Columbia, and Eleventh Circuits, *e.g., In re Korean Air Lines Disaster*, 932 F.2d 1475, 1479 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991); *Butler* v. *Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985), and by district courts in other cir-

[14] Cheng, *Wilful Misconduct: From Warsaw to The Hague and from Brussels to Paris*, 2 Annals of Air & Space Law 55, 55 (1977).

cuits.[15] The same standard has also been accepted by the highest courts of Alaska, New York, Ohio, and Puerto Rico. *E.g., Korean Air Lines Co.* v. *State*, 779 P.2d 333, 337 nn.2-3 (Alaska 1989); *Rymanowski* v. *Pan American World Airways, Inc.*, 416 N.Y.S.2d 1018, 1020 (App. Div. 1979), *aff'd mem.*, 404 N.E.2d 1336 (N.Y. 1980); *The Limited Stores, Inc.* v. *Pan American World Airways, Inc.*, 600 N.E.2d 1027, 1032-33 (Ohio 1992); *Delgado* v. *Pan American World Airways, Inc.*, 16 Av. Cas. (CCH) 18,462, 18,466-67 (P.R. 1982).

Under the case law prior to this decision, the central importance of the carrier's state of mind was undiminished when plaintiffs' theory of wilful misconduct was based on the violation of a government safety rule. In *American Airlines, Inc.* v. *Ulen*, 186 F.2d 529 (D.C. Cir. 1949), the District of Columbia Circuit ruled that even an *intentional* violation of a safety regulation would not constitute wilful misconduct unless the carrier acted with the requisite knowledge or reckless disregard of probable consequences.[16] Similarly, the New York courts

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[15] *See, e.g., Onyeanusi* v. *Pan American World Airways, Inc.*, 1990 U.S. Dist. LEXIS 7368, at *7, *reh'g denied*, 767 F. Supp. 654 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992); *Hill* v. *United Airlines*, 550 F. Supp. 1048, 1055 (D. Kan. 1982); *Machinenfabrik Kern, A.G.* v. *Northwest Airlines, Inc.*, 562 F. Supp. 232, 240 (N.D. Ill. 1983). This definition had also been previously applied by the Second Circuit. *See, e.g., Pekelis* v. *Transcontinental & W. Air, Inc.*, 187 F.2d 122, 124 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *Ospina* v. *Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993).

[16] The D.C. Circuit sustained the following jury instruction:

> "[T]he mere violation of those [safety rules and regulations], . . . *even if intentional, would not necessarily constitute wilful misconduct*, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences." 186 F.2d at 533 (emphasis added).

The Second Circuit had previously approved the *Ulen* rule. *Berner* v. *British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 537

in *Goepp* v. *American Overseas Airlines, Inc.*, 117 N.Y.S.2d 276 (App. Div. 1952), *aff'd mem.*, 114 N.E.2d 37 (N.Y.), *cert. denied*, 346 U.S. 874 (1953), set aside a jury verdict in part because there was no proof that the carrier's interpretation of the safety rule had been "conceived in bad faith" or implemented with the realization of probable injury.[17]

In short, until the instant decision, it had for many years been the established rule that a violation of a safety regulation is *not per se* wilful misconduct under Article 25 of the Warsaw Convention. The collective understanding that this was the settled rule is reflected in the aviation law treatises.[18]

2. *The Decision Below Conflicts with the Established Rule.* The decision below repudiates the established standard for wilful misconduct and replaces it with a new and simple standard: did the carrier violate a safety rule? For the first time, a court has held that evidence

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(2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). The majority below did not cite either *Berner* or *Ulen*.

[17] 117 N.Y.S.2d at 281 (emphasis added):

> "As to the asserted violations, even if the pertinent regulations were susceptible of varying interpretations, and defendant's version thereof were incorrect, there is no proof that defendant's interpretation was *conceived in bad faith*, that it was arrived at with any intimation that it was incorrect, or that it was arrived at, or effectuated, in a disregard of the possible consequences of an erroneous interpretation. *These would be necessary elements to establish wilful misconduct. . . . There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.*"

[18] *See* H. Drion, Limitation of Liabilities in International Air Law ¶ 188, at 225-28 (1954); 1 L. Kreindler, Aviation Accident Law § 11.05[4], at 11-89 (rev. ed. 1994); 1 P. Martin, et al., Shawcross & Beaumont Air Law § VII(210), at VII/209 (4th ed. 1994) (hereinafter "Shawcross & Beaumont"); 1 S. Speiser & C. Krause, Aviation Tort Law § 11.37, at 773 n.43 (1978).

of the carrier's actual state of mind should be excluded when that evidence would be inconsistent with the criminal-law doctrine that ignorance of the law is no defense.[19] Indeed, under the decision below, evidence that the carrier acted in a good faith belief that it was in compliance with safety rules can be excluded even when the plaintiffs have put before the jury their evidence (a) that the carrier *intentionally* violated a safety regulation and (b) that the carrier lied about receiving government approval of its practices.[20] Those rulings obviously conflict with the decisions from other circuits and state courts holding that the carrier's state of mind is the critical factor under Article 25 and that even an *intentional* violation of a safety rule is not wilful misconduct unless it was committed in knowing or reckless disregard of probable death or injury.[21]

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[19] The majority below refers to Pan Am's evidence as "the alleged oral waiver" (App. 7a (heading)), but as the dissent notes, this characterization misstates Pan Am's position that it had orally received, not a waiver, but "an 'interpretation' of what it deemed an ambiguous regulation" (App. 46a).

[20] The majority below questioned the adequacy of Pan Am's proffer (App. 13a-15a), but "[a]ssum[ed] without deciding that defendants sufficiently preserved their objection . . ." (App. 16a-17a). The dissenting opinion, however, makes clear that Pan Am's proffer was entirely adequate. Judge Van Graafeiland quotes extensively what was said orally and in writing in support of the proffer (App. 48a-50a, 64a-79a). He also quotes the trial judge, who at one point said to counsel that he was ruling *"for the '425th time'* that Salazar's verbal permission was 'not in this case'" (App. 83a (emphasis added)). Plainly, "the substance of the [excluded] evidence was made known to the court . . . ." That is all Fed. R. Evid. 103(a)(2) requires.

[21] The majority, moreover, has unduly restricted the government-authorization defense. The record shows that the FAA security director testified that he and his personnel had authority to give oral *interpretations* of the ACSSP (App. 46a), and that the FAA could enforce oral interpretations of the ACSSP, *United States* v. *Eastern Air Lines, Inc.*, 792 F.2d 1560 (11th Cir. 1986). The majority holds that, because the oral interpretation that Pan Am

There is no reasonable way to read the majority opinion that would avoid this conflict. While the majority states that "noncompliance with ACSSP procedures will not necessarily lead to a *per se* finding of wilful misconduct" (App. 13a), the majority does not explain how any other conclusion could be reached at trial. If plaintiffs' assertion of a rule violation cannot be rebutted by defendants with proof showing that it believed that its actions were in compliance with the safety rule, then the violation becomes *per se* wilful misconduct.

Two further rulings of the court of appeals show its insistence that the carrier's state of mind is irrelevant to the determination of "wilful misconduct." First, the court below held that district courts are authorized to exclude the carrier's evidence of its state of mind under a "balancing test" when that evidence was "so intertwined" as to be "unnecessarily confusing and perhaps prejudicial" (App. 21a). Second, the court of appeals ruled alternatively that exclusion of Pan Am's reasons for using x-ray, if error at all, was "harmless" (App. 21a-24a).[22] If exclusion of evidence of the carrier's state of the mind (*i.e.*, why it did what it did) can be justified by a balancing test or deemed harmless, then the carrier's state of mind is plainly no longer a key ingredient of wilful misconduct.

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received about x-ray was contrary to what the majority, years after the fact, says is the rule's "unambiguous" meaning, that the earlier oral advice was erroneous and could not be used to rebut the charge that Pan Am violated the ACSSP (App. 17a). But the government-authorization defense would be useless if it were only available when the government's advice, in a court's later view, turns out to be correct. The decision below thus conflicts with this Court's decisions that a regulated entity can defend itself by showing that it relied on mistaken advice from the responsible administrative agency. *See United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 673-75 (1973); *United States* v. *Laub*, 385 U.S. 475, 487 (1967).

[22] We show in Part III that this conclusion rests on appellate fact-finding of disputed issues.

B. The Decision Below Raises Issues Of Critical Importance To The Administration Of The Warsaw Convention.

1. Article 25 is the linchpin of the Convention's limitations on liability, and the international community has previously taken special care to achieve a measure of uniformity in the implementation of this controversial and often-litigated provision. After Article 25 was adopted in 1929, a conflict developed among the decisions of various countries relating to its requirements.[23] That conflict was resolved by The Hague Protocol of 1955, 478 U.N.T.S. 371, which amended Article 25 to provide that the limitations on liability could only be lifted when the damage resulted from an act or omission "done with intent to cause damage or recklessly and with knowledge that damage would probably result." The fact that the United States did not ratify The Hague Protocol has not frustrated the uniformity that The Hague Protocol brought to the Warsaw system, because the standard in the Protocol's revised Article 25 was intended to conform to the standard that traditionally had been applied by U.S. and British courts

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[23] As shown above (pp. 11-13), American courts looked to the carrier's state of mind to determine wilful misconduct. The British courts agreed. For instance, in *Horabin* v. *British Overseas Airways Corp.*, [1952] 2 All E.R. 1016, 1022 (Q.B. 1952), an English judge instructed the jury on wilful misconduct under Article 25 as follows: "To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be." On the other hand, the courts of some civil-law countries, such as France, held that a carrier could be found liable if it were judged grossly negligent under an objective standard. *See generally* H. Drion, *supra*, ¶¶ 174-90; R. Mankiewicz, The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System § 163, at 122-23 (1981); N. Matte, Treatise on Air-Aeronautical Law 422-24 (1981); 1 Shawcross & Beaumont, *supra*, § VII(210).

in implementing Article 25 under the original Convention.[24]

Since The Hague Protocol, the great majority of foreign courts have held that the Convention's liability limitations can be lifted only when the carrier acted, or failed to act, with actual knowledge that damage would probably result.[25] Moreover, foreign courts have specifically held that violations of safety rules will not lift the limitations on liability unless the carrier has acted in reckless disregard of a known probability of damage.[26]

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[24] *See* Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. Air L. & Com. 253, 266-67 (1956) (Chairman of U.S. delegation at The Hague Conference writes: "[T]he revised article is believed to be substantially a paraphrase of the present Article 25 as it is administered by United States courts . . ."). Other leading commentators on the Convention have agreed that The Hague Protocol adopted the law of wilful misconduct as understood in Britain and the United States. Cheng, *supra*, at 92; Mankiewicz, *From Warsaw to Montreal with Certain Intermediate Stops; Marginal Notes on the Warsaw System*, 14 Air L. 239, 244 (1989); N. Matte, *supra*, at 439; G. Miller, Liability in International Air Transport: The Warsaw System in Municipal Courts 201 (1977). The minutes of the Conference also show that this was the delegates' intention. International Conference on Private Air Law, vol. 1, at 193, 197, ICAO Doc. 7686-LC/140 (Sept. 1956).

[25] *See, e.g., Claudio* v. *Avianca*, 20 Av. Cas (CCH) 18,320 (Swiss Fed. Ct. 1987); *S.S. Pharmaceutical Co.* v. *Qantas Airways, Ltd.*, 1 Shawcross & Beaumont Av. Rep. VII/443 (Austl., N.S.W. Ct. App. 1990); *Belgian Int'l Air Services* v. *Mandreoli*, 1 Shawcross & Beaumont Av. Rep. VII/601 (Italy, Milan Ct. App. 1974). *See also Complaint of Tecomar S.A.*, 765 F. Supp., 1150, 1182 (S.D.N.Y. 1991) ("both German and Belgian law construe Article 25 to require actual knowledge."). The principal exceptions to this statement have been certain French decisions appearing to hold that the determination under Article 25 is to be made under "objective" standards. *See generally* Cheng, *supra*, at 95; R. Mankiewicz, The Liability Regime of the International Air Carrier, *supra*, §§ 158-59, at 115-17; G. Miller, *supra*, at 208-11; 1 Shawcross & Beaumont, *supra*, § VII(132).

[26] *See Sotramat* v. *Delaby*, 1967 Eur. Transp. L. 1046 (Belg. Ct. App. 1965) (English summary: "A breach of air regulations

The decision below plainly undermines the uniformity that the Warsaw Convention and The Hague Protocol have brought to litigation involving claims for unlimited liability in international aviation disaster cases. The exceptional public prominence of this case ensures that the Second Circuit's radical curtailment of the Convention's limitations on liability will lead to significant upheaval in what had been a settled rule of international aviation law.

2. The Court of Appeals has tried to minimize the importance of its departure from Warsaw and Hague jurisprudence with the statement that its opinion is limited to cases involving safety-rule violations (App. 20a). In fact, safety-rule violations are the staple of most plaintiffs' efforts to prove that wilful misconduct caused the accident. Long ago, leading commentators on the Convention recognized that, if proof of a rule violation, standing alone, were sufficient to show wilful misconduct, "the consequences would be that the large majority of aircraft accidents would probably involve wilful misconduct." H. Drion, *supra*, ¶ 188, at 225-26; *see also* D. Goedhuis, National Airlegislations and the Warsaw Convention, at 273-74 (1937).[27] This is because air safety regulations are so pervasive that it is possible for plaintiffs to attribute virtually any aviation accident to a violation of some rule.[28] The resulting impairment of the Warsaw Conven-

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committed by the pilot is not necessarily a wilful act preventing the carrier to avail himself of the limitation of liability provided by the Warsaw Convention."); *Goldman* v. *Thai Airways Int'l, Ltd.*, [1983] 3 All E.R. 693 (Eng. Ct. App. 1983) (pilot's disregard of requirement in flight operations manual is not sufficient in absence of evidence that pilot in fact knew of the violation and of the probability that injury would result from that violation).

[27] Both Drion and Goedhuis were criticizing the suggestion in Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air L. 1, 44 (1936), that violations of government regulations should constitute wilful misconduct.

[28] H. Drion, *supra*, § 188, at 226 (footnote omitted). For instance, the safety rules for U.S. air carriers cover some 200 pages

tion is magnified when, as here, the carrier is not even allowed to show that it believed that there was no rule violation.

In short, the decision below warrants review by this Court. It conflicts with the rulings of American and foreign courts and undermines the Convention's limitations on liability, even though those limitations were the Convention's "primary purpose." *Floyd*, 499 U.S. at 546.

II. WHETHER PLAINTIFFS MAY BE RELIEVED OF THE BURDEN OF SPECIFICALLY PROVING CAUSATION IS AN IMPORTANT ISSUE JUSTIFYING REVIEW BY THIS COURT.

Under Article 25, it is not enough that the carrier have committed some act of "wilful misconduct": the particular act of wilful misconduct must also have "caused" the damage. The courts below announced a new standard that relieved plaintiffs of the burden of proving specifically how Pan Am's purported misconduct actually caused the destruction of Flight 103.

In the district court, Pan Am contended that the method of planting the bomb on board Flight 103 was unknown and that the Air Malta theory was wrong. The district court ruled that Pan Am's defense entitled plaintiffs to adduce a wide variety of alleged acts and omissions to establish the proposition that, even if the method of bombing is unknown, Pan Am should be deemed responsible (J.A. 1440). The court of appeals upheld this ruling on the ground that "under the Warsaw Convention wilful misconduct causing an accident may be established by *inference* from the *totality of the circumstances*" (App. 31a (emphasis added)). At the same time, moreover,

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in the Code of Federal Regulations, 14 C.F.R. pts. 108, 121. Those regulations are expanded upon and implemented by FAA-approved manuals and procedures, which are themselves voluminous. For example, Pan Am's security manual was 230 pages long (J.A. 3818-4047).

the court upheld the exclusion of Pan Am's efforts to rebut that "inference" (App. 33a).[29]

This ruling conflicts with the foreign and American case law. When the cause of a crash is unknown, the treaty makes the carrier presumptively liable up to the limitations on liability ($75,000 in this case).[30] On the other hand, as the decisions of foreign courts show, plaintiffs cannot, by invoking Article 25, recover more than the limitations allow when the actual cause of the accident is unknown.[31]

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[29] Pan Am was prepared to show—but not allowed to show—that sophisticated terrorists have methods for planting a bomb that would not have involved any misconduct by the carrier. For instance, there were almost 40,000 airport workers at Frankfurt with access to restricted areas, and they could come and go without having their bags routinely searched (J.A. 4448-62). Remarkably, the court of appeals has affirmed the exclusion of Pan Am's evidence showing possible exculpatory causes because that evidence was deemed "speculative" (App. 33a), while at the same time adopting a new rule that permits the jury to speculate from an agglomeration of disparate events that Pan Am's "pervasive and extensive wilful misconduct . . . *must have accounted* for the bomb's presence" (App. 29a (emphasis added)).

[30] Article 17 of the Convention renders the carrier liable for injuries sustained in aviation accidents. Article 20 provides that the carrier can defend against this liability only if it shows it took "all necessary measures to avoid the damage or that it was impossible" to take such measures. But, under the Montreal Agreement, even the limited defense under Article 20 is inapplicable to any flight serving a point in the United States.

[31] *See, e.g.*, R. Mankiewicz, The Liability Regime of the International Air Carrier, *supra*, § 159, at 117 ("the carrier cannot be held liable without limitation when it is impossible to identify the cause of the accident."); *id.*, § 161.3, at 120 (quoting Swiss decision holding "as it is impossible to establish with certainty where and why the packages were lost, it is impossible to identify the person whose fault had caused the loss and it is therefore also impossible to prove that he had actual knowledge of the probability of the damage as required by Article 25."); *Ouvière* v. *Farrugio*, 1980 Revue Française de Droit Aérien 200 (Fr. Cass. Civ. 1re 1980) (French decision holding that limitation applies when cause of pilot's maneuver could not be established).

In America, when the actual cause of the loss or injury is unknown, plaintiffs have tried unsuccessfully to invoke the Article 25 exception by relying on the doctrine of *res ipsa loquitur*.[32] Thus, the Ninth Circuit has rejected the use of *res ipsa loquitur* to show wilful misconduct under Article 25. *Johnson* v. *American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987).[33] And the Third Circuit has affirmed a district court decision, following *Johnson*, that ruled: "The doctrine of res ipsa loquitur cannot be used to create an inference of wilful misconduct." *Onyeanusi* v. *Pan American World Airways, Inc.*, 1990 U.S. Dist. LEXIS 7368, at *8, *reh'g denied*, 767 F. Supp. 654 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992). The Third Circuit had earlier reached the same result when it upheld a judgment for the carrier because the "evidence as to causation was meager and incomplete . . . ." *Berguido* v. *Eastern Air Lines, Inc.*, 369 F.2d 874, 880 (3d Cir. 1966), *reh'g denied*, 378 F.2d 369 (1967), *cert. denied*, 390 U.S. 996 (1968).[34]

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[32] *Res ipsa loquitur*, of course, allows a *negligence* case to go to the jury when "the facts of the occurrence warrant the inference of negligence . . . [and] furnish circumstantial evidence of negligence where direct evidence of it may be lacking." *Sweeney* v. *Erving*, 228 U.S. 233, 240 (1913). Contrary to what happened here, the defendant in a negligence case, of course, is allowed an opportunity to rebut that inference.

[33] 834 F.2d at 724:

> "Plaintiffs contend that wilful misconduct by the airlines was the only and obvious inference from the facts alleged in their complaint. . . . Plaintiffs would invoke the doctrine of *res ipsa loquitur* to support their contention that these allegations create an inference of an intentional act committed while the casket was in the airlines' control. The doctrine of *res ipsa loquitur* provides a means of establishing negligence from certain facts. . . . We refuse, upon the showing made, to extend to the doctrine to prove an intentional tort."

[34] The court below relied (App. 31a) on *In re Korean Airlines Disaster*, 932 F.2d 1475, 1481 (D.C. Cir.), *cert. denied*, 112 S. Ct.

In relieving plaintiffs of the burden of proving that a particular act of wilful misconduct caused the disaster, the court of appeals has placed the law in the Second Circuit in conflict with well-established precedents both here and abroad. Its repudiation of the causation requirement, if not overturned, will, in the words of a respected commentator on the Convention, "lead to the very destruction of what was the major purpose of the Warsaw Convention: unification of the law. . . . The fact that the limit provided in the Convention has, in the views of many Americans, become inadequate as far as the U.S.A. is concerned should not be a reason for American Courts to change the international rules established by the Convention."[35]

Until the decisions rendered by the courts below in this case, no American court had "changed the international rules" requiring plaintiffs to bear the burden of proving under Article 25 that a particular act of wilful misconduct caused the accident. This, too, calls for review by this Court.

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616 (1991); but that decision held only that plaintiffs could prove their specific theory of causation by circumstantial evidence.

[35] H. Drion, *supra*, ¶ 191, at 231. *Accord*, Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law—Part II*, 27 J. Air L. & Com. 119, 135 (1960). Dr. Drion's criticism of American courts was expressly directed against the "line of thinking" exemplified by the *dissenting* opinion in *Goepp* v. *American Overseas Airlines, Inc.*, 117 N.Y.S.2d 276 (App. Div. 1952), *aff'd mem.*, 114 N.E.2d 37 (N.Y.), *cert. denied*, 346 U.S. 874 (1953). In that dissent, Justice Breitel had urged that "because of the mysteries in which the fatal and more serious accidents become shrouded, a liberal approach in finding proximate cause from any kind of misconduct which may lead to multiple fatalities is socially justified, if not required." 117 N.Y.S.2d at 283.

III. THE MISUSE BY THE COURT OF APPEALS OF THE HARMLESS ERROR DOCTRINE REQUIRES THE SUPERVISION OF THIS COURT.

This Court should also review this case in order to restore the proper allocation of functions between juries and appellate courts within the Second Circuit. The dissent below found that the district court's *sua sponte* exclusion of Pan Am's evidence "was so contrary to established legal precedent and simple justice that it smacked of a due process and Seventh Amendment violation" in that "Sonesen, whose proposed testimony was an important part of Pan Am's defense, was branded a liar, and the district judge precluded Pan Am from attempting to prove that he was not" (App. 70a).

The majority found, nonetheless, that exclusion of Pan Am's evidence, if error at all, was "harmless" (App. 21a-24a). That ruling would be extraordinary even if every fact on which it is based were true (App. 64a-67a, 80a-81a). But here, the majority's harmless error ruling rests upon pervasive fact-finding that is shaped by its own predilections and that ignores the proof that Pan Am placed in evidence, and thus the ruling violates the limits upon appellate incursion into factual matters left to the jury by the Constitution and two centuries of judicial practice. Four prominent findings of fact by the majority serve to show that the court below has chosen to ignore the constraints on appellate review in order to avoid a retrial of this case.

1. *Helsinki Warning.* The "Helsinki warning" advised that a Finnish woman would unwittingly carry a bomb aboard a Pan Am flight from Frankfurt. The majority asserts that Pan Am's response to this warning was "[t]he most wilful disregard of passenger safety, bordering on outrageous . . ." (App. 22a). The dissenting opinion, however, charges that the majority's assertion of inaction by Pan Am is "in the nature of a half-truth" (App. 52a). The dissent quotes the testimony of Wolfgang Schwab

that explains the special screening and search procedures instituted by Pan Am security personnel in response to the warning (App. 52a-54a).[36] The majority does not explain why it has rejected the testimony quoted by Judge Van Graafeiland.

2. *Toshiba Warning.* The "Toshiba warning" alerted carriers that a bomb had been found in a radio seized by the German police. The majority finds that "Pan Am did not even alert x-ray technicians to watch for Toshiba radios" (App. 23a). The majority does not explain why it rejects Pan Am's testimony that it required that *every* radio revealed by x-ray inspection of baggage at Frankfurt be removed and operated (J.A. 4541-42). Nor does the majority explain its discrediting of the testimony of the x-ray operator for Flight 103 (1) that he *had* been told to inform a supervisor if the x-ray revealed a radio (J.A. 3382-83), and (2) that there was no radio in the bags that he x-rayed for Flight 103 (J.A. 3392-93). It was stipulated that even a layperson could detect on an x-ray monitor the presence of a radio inside a suitcase (App. 40a).

3. *Report by Security Consultants.* The majority charges that Pan Am ignored a report made in 1986 by a security consulting firm. That report, the court says, "specifically cautioned Pan Am on the use of x-ray machines as substitutes for physical searches . . ." (App. 22a). By contrast, the British Government authorized the use of x-ray to screen unaccompanied baggage. Thus, at trial, Pan Am offered testimony that "x-raying interline bags . . .

---

[36] The testimony in the record also shows that Pan Am dispatched its Security Manager for Europe to Finland to interview the embassy official who had received the warning (Tr. 3984-4012). Despite the opinion of Finnish and British authorities that the warning was a hoax (a conclusion also reached by the FAA after the disaster) (Tr. 4003-04, 4010, 765), Pan Am instituted the passenger screening measures described by Schwab and also directed that the baggage of interline Finnish female passengers be hand-searched (Tr. 4764, 5254-55; J.A. 1119).

complied with British security directives" that had been adopted by the British to thwart terrorist bombing; but that testimony was excluded (App. 24a). In both its initial and revised opinions, the majority has held that the exclusion of the British regulations was "harmless error" (App. 25a, 121a). In its first opinion (but not its revised opinion), the majority recognized that this proof regarding the British regulations was "offered by Pan Am to undercut the allegation that it consciously or recklessly disregarded the probable consequences of its x-ray procedure . . ." (App. 121a). Now, the court of appeals has obviously chosen to discount the British authorities' approval of x-ray and simultaneously to credit the consulting firm's disapproval of x-ray and to condemn Pan Am for not adhering to the views of the consulting firm.

4. *Weber's Backdating.* Finally, the majority finds that Ulrich Weber (the head of Alert in Frankfurt) "deliberately placed" the Helsinki warning under a pile of papers and then ordered it backdated after the disaster (App. 23a). As Judge Van Graafeiland notes (App. 54a), there is no record citation (and no evidence) to support the charge of "deliberately placed." Most important, Weber himself categorically denied that the warning was backdated (J.A. 2325-26). Again, the majority does not explain why it rejected Weber's testimony.

* * * *

There is no basis for the court of appeals to have concluded that the jury must have resolved these factual disputes against Pan Am in its verdict. Plaintiffs' case was based on a conglomeration of charges of misconduct against Pan Am, and the jury was not instructed that it must resolve each of these particular disputes to make its determination on liability. Hence, it is plain that, in resting on "harmless error," the majority has itself selected among competing and conflicting versions of the facts offered at trial and has resolved those factual disputes in its own set of findings.

Appellate fact-finding cannot be used to repair a hopelessly flawed trial. An appellate court is "not authorized to look at the printed record, resolve conflicting evidence and reach the conclusion that the error was harmless because [it] think[s] the defendant was guilty." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945). Such appellate fact-finding is inappropriate even for a bench trial. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). *A fortiori*, such appellate fact-finding is improper where there has been a jury trial. In those cases where there are issues of fact "on which fair-minded jurors might honestly differ," "[i]t is not for the judges to resolve the conflict and to conclude that one side or the other was right." *Maynard* v. *Durham & S. Ry.*, 365 U.S. 160, 163 (1961). Any other rule would, of course, violate the Seventh Amendment right to a civil jury trial.[37] That violation is doubly dangerous when, as the dissent notes, it reflects a "zeal to support the outcome of an obviously unfair trial . . ." (App. 74a).

This Court should grant review to make it clear that it will not countenance appellate fact-finding of the dimensions that occurred here.

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[37] The Court has recently held that "[f]orbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek* v. *United States*, 498 U.S. 192, 203 (1991). The same is true under the Seventh Amendment. *See, e.g., Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 625 (1991) ("Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict."); *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 387-88 (1913) ("[I]t is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence . . . [t]he court cannot dispense with a verdict . . . and itself pass on the issues of fact.").

CONCLUSION

A writ of certiorari should issue to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

Respectfully submitted,

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November 25, 1994

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

JUDITH A. PAGNUCCO, DONA BARDELLI BAINBRIDGE,
MOLENA A. PORTER, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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187 pp

TABLE OF CONTENTS

Appendix		Page
A.	Revised Majority and Dissenting Opinions of the Court of Appeals (September 12, 1994)	1a
B.	Order Denying Petition for Rehearing Except to Extent Stated in Revised Majority Opinion and Denying Suggestion for Rehearing In Banc (September 12, 1994)	85a
C.	Order Denying Second Petition for Rehearing and Suggestion for Rehearing In Banc (October 28, 1994)	87a
D.	Corrected Order Denying Second Petition for Rehearing and Suggestion for Rehearing In Banc (Dated October 28, 1994)	89a
E.	Letter from Clerk (November 2, 1994) Enclosing Memoranda of Judge Van Graafeiland	91a
F.	Order Granting Motion To Stay Issuance of the Mandate Pending Certiorari (November 9, 1994)	95a
G.	Initial Opinions of the Court of Appeals (Majority Opinion Dated January 31, 1994 and Dissenting Opinion Dated February 18, 1994)	96a
H.	Opinion of the District Court Denying Alert's Motion for Judgment as a Matter of Law (November 2, 1992)	176a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1280, 1281, 1282—August Term 1992

Petition for Rehearing Submitted: April 6, 1994

Docket Nos. 92-9251, 92-9253, 92-9255

[Decided September 12, 1994]

IN RE: AIR DISASTER AT LOCKERBIE SCOTLAND ON DECEMBER 21, 1988

JUDITH A. PAGNUCCO, Individually and as Executrix of the Estate of Robert I. Pagnucco, deceased; MOLENA A. PORTER, Individually and as Administratrix of the Estate of Walter L. Porter, deceased and DONA BARDELLI BAINBRIDGE, Individually and as Administratrix of the Estate of Harry M. Bainbridge,

Plaintiffs-Appellees,

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., and ALERT MANAGEMENT SYSTEMS, INC.,

Defendants-Appellants.

Before:

VAN GRAAFEILAND, CARDAMONE and ALTIMARI,

Circuit Judges.

CARDAMONE, *Circuit Judge*:

Pan American World Airways, Inc. (Pan Am) and Alert Management Systems, Inc. (Alert) (collectively Pan Am, defendants or appellants) appeal from final judgments entered on September 9, 1992 in the United States District Court for the Eastern District of New York (Platt, C.J.) in three cases arising out of the Pan Am Flight 103 terrorist bombing that occurred over Lockerbie, Scotland in December 1988. The trial was bifurcated into a liability phase, binding on all plaintiffs whose cases were consolidated in this multidistrict litigation, and a damages phase governing the cases of the three plaintiffs before us. The damages phase will also set the standards for damage awards in future cases resulting from this tragic disaster.[1]

Few Americans have forgotten the bombing of Flight 103 over Lockerbie, Scotland a few days before Christmas in 1988. There were 259 Americans aboard Pan Am's plane from all walks of life. Among the passengers were business executives, entrepreneurs, airline employees, and college students—including 38 Syracuse University students returning home from studying abroad. Although four years have passed since this tragedy occurred, it remains vivid in our national consciousness, standing as a reminder of our collective vulnerability to wanton terrorist acts.

The 13-week liability trial controlled all the consolidated cases that had been filed against Pan Am throughout

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[1] This opinion has been circulated to the active judges of the Court prior to filing. A petition for rehearing of the panel decision filed on January 31, 1994 was submitted on April 6, 1994. After considering the petition, the majority opinion filed January 31, 1994 and the dissenting opinion filed February 18, 1994 were withdrawn and the instant revised majority and dissenting opinions are filed in place thereof. Except to the extent indicated in the revised majority opinion, the petition for rehearing is denied.

the United States by the passengers' and the crew's survivors and representatives. Trial began April 27, 1992. The jurors heard lengthy testimony from 58 witnesses, much of which was introduced by the over 180 depositions obtained during massive discovery taken worldwide. At its close, the jury rendered a special verdict finding defendants guilty of wilful misconduct that caused the explosion and the crash.

At the conclusion of the damages phase $9,225,000 was awarded to the Pagnucco family, $9,000,000 to the Bainbridge family, and $1,735,000 to the Porter family. Decedents Pagnucco and Bainbridge had been Pepsico attorneys, decedent Porter an electrician and part-time musician. The damage awards included damages for loss of society and damages for loss of parental care to adult children. No award for survival damages—sought by plaintiffs—was made because the jury found the passengers had suffered no conscious pain and suffering before their deaths. Pan Am and Alert appeal challenging the finding of liability and the damage awards.

BACKGROUND

On December 21, 1988 a bomb exploded on Pan Am Flight 103 causing it to crash over Lockerbie, Scotland. The 243 passengers and 16 crew members aboard the flight traveling from London to New York all perished. Numerous plaintiffs, including those in the cases before us, brought wrongful death actions against Pan Am and Alert, a Pan Am affiliate that provided security services in London and in Frankfurt, where Flight 103 originated. All those actions were consolidated for trial in the Eastern District of New York.

A single jury trial was conducted before Chief Judge Platt to try the liability issues common to the passenger cases. The parties agreed that the case was governed by the Warsaw Convention, formally named the Convention for the Unification of Certain Rules Relating to Interna-

tional Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note (1988) [hereinafter Warsaw Convention]. Although the Warsaw Convention generally limits a carrier's liability for damages to $75,000 per passenger, Article 25 permits recovery of unlimited compensatory damages provided the carrier's "wilful misconduct" caused the damages. An earlier decision of this Circuit established that punitive damages may not be collected under the Warsaw Convention. *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988 ("Lockerbie I")*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

On July 10, 1992 the jury found that the defendants engaged in wilful misconduct that led to this fatal crash. The trial's liability phase centered on Pan Am's alleged noncompliance with Federal Aviation Administration (FAA) directives concerning baggage inspection, particularly with regard to unaccompanied baggage that might contain explosives. Additional proof was introduced regarding other alleged misconduct on the air carrier's part. Plaintiffs contended that the bomb entered the flight on an unaccompanied bag that Pan Am, through its wilful misconduct, failed to inspect and detect. Under plaintiffs' theory—detailed by several expert witnesses—the bomb was hidden inside a radio-cassette player packed in a bronze Samsonite suicase. The suitcase supposedly traveled from Malta to Frankfurt on Air Malta Flight 180. There, the experts posited, it was transferred to the first leg of Flight 103 from Frankfurt to London, where it was then placed on Flight 103 bound for New York.

Although bags transferred from other flights to Flight 103 in Frankfurt were x-rayed, plaintiffs assert the airline's x-ray procedure violated security requirements contained in an FAA regulation at issue in this case, Air Carrier Standard Security Program or ACSSP XV.C.1.(a), which ensured that bags matched passengers and that any un-

accompanied bags be physically inspected. Pan Am unsuccessfully argued to the jury that its actions did not amount to wilful misconduct, and that it was impossible to determine how the bomb was planted on Flight 103. To meet plaintiffs' claims of wilful misconduct, Pan Am and Alert emphasized that the transferred bags had been examined using x-ray equipment, but that no bomb was discovered. They challenged plaintiffs' theory of causation and suggested that even if there were any misconduct on their part, it did not lead to the crash.

In finding defendants liable the jury rendered a special verdict. On the special verdict form, it indicated that it had specifically found 1) that "Pan Am (including Alert) engage[d] in wilful misconduct," and 2) that the wilful misconduct was "a substantial factor in causing the disaster." Following the liability phase, the jury then awarded compensatory damages in the three plaintiffs' cases. There are 207 other passenger cases pending, all awaiting the outcome of this appeal.

DISCUSSION

On appeal Pan Am rolls out a panoply of arguments, most involving evidence the district court excluded, and which, therefore, was not heard or considered by the jury. These contentions concern four broad areas: I) the exclusion of evidence related to Pan Am and Alert's alleged noncompliance with ACSSP regulations concerning unaccompanied baggage; II) the admission of evidence showing other alleged misconduct on appellants' part coupled with the disallowance of defense testimony concerning alternate theories of causation; III) various other evidentiary rulings; and IV) the legal bases for the damage awards. In the discussion that follows, we examine each of these four areas in order.

I. EXCLUDED EVIDENCE PAN AM AND ALERT ARGUE WOULD HAVE NEGATED ANY WILFUL MISCONDUCT ARISING FROM THEIR NONCOMPLIANCE WITH CERTAIN ACSSP REGULATIONS

Appellants insist the trial court committed reversible error in excluding several pieces of evidence that might have negated a finding of wilful misconduct based on appellants' alleged failure to comply with FAA regulations concerning unaccompanied baggage. This first challenge centers on rulings excluding three lines of evidence that appellants believe were relevant to Pan Am and Alert's state of mind, that is, their wilfulness. The main line of barred evidence purportedly demonstrated an oral waiver by the FAA, excusing Pan Am's compliance with relevant security regulations. The breach of those regulations was central to plaintiffs' case and, as a response, Pan Am and Alert sought to demonstrate that they thought they were complying with the FAA requirements.

The second piece of barred evidence was British regulations that did not require the observance of the same safety standards as did those of the FAA. Appellants sought to negate any inference of wilfulness on their part by showing that x-raying baggage transferred from other airlines—the procedure Pan Am followed—complied with the British regulations. The third piece of evidence not entertained was proof that some experts believe the highest threat to airline safety is not posed by unaccompanied baggage. Each of these three lines of evidence, appellants urge, might have negated plaintiffs' showing of wilful misconduct.

The standard of liability under the Warsaw Convention, as already noted, requires that a carrier have engaged in "wilful misconduct" causing the claimed losses in order for plaintiffs to hold a carrier liable in an amount exceeding the Convention's $75,000 damage limit. *See* Warsaw Convention, art. 25. Wilful misconduct under the Convention means that a carrier must have acted either 1)

with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions. *See Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993); *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1479 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991). The district court charged the jury under that standard and also charged it that the standard applied whether wilful misconduct resulted from an act or failure to act by the carrier. Appellants do not challenge the district court's jury instruction as to wilful misconduct. Instead, they focus on the just recited three different lines of proof they were not allowed to present to guide the jury's application of that standard, that is, the oral waiver, the British regulations, and expert testimony regarding the threat posed by unaccompanied baggage.

A. *The Alleged Oral Waiver*

We begin discussion by reference to the standard of review on appeal from an exclusion of evidence at trial. That standard establishes that the relevance and admissibility of proffered evidence rests in the sound discretion of the trial court. *See, e.g., United States v. Caming*, 968 F.2d 232, 238 (2d Cir.), *cert. denied*, 113 S. Ct. 416 (1992); *United States v. Ebner*, 782 F.2d 1120, 1126 (2d Cir. 1986). Defendants maintain that an FAA official granted them an oral waiver excusing strict compliance with certain FAA regulations, and that Chief Judge Platt abused his discretion when he disallowed their evidence purporting to demonstrate their belief in this waiver. Although Pan Am is imprecise as to the date of the purported waiver, it asserts it was given verbally to a Pan Am official. Virtually no written documentation supports it. Defendants' argument essentially is that this evidence would have shown that their x-ray inspection of interline bags complied with FAA requirements or that, regardless

of FAA requirements, they did not act with conscious or reckless disregard of the probable consequences of their x-ray procedures since they thought the safety precautions they were following were permissible.

1. *The Unambiguous Nature of ACSSP Regulation XV C.1.(a)*

In support of this point, Pan Am points out that a regulation may be interpreted orally, and that the regulation at issue is ambiguous and therefore susceptible to such an interpretation. We are unable to accept appellants' premise that the supposed oral waiver was in fact an interpretation of an ambiguous regulation. As a matter of law the FAA regulation at issue here—ACSSP XV C.1(a)—is not ambiguous, as the following discussion demonstrates.

In April 1986 the FAA established specific ACSSP regulations and mandated that they be followed at heightened security airports designated "extraordinary security" airports. Both Frankfurt and London's Heathrow airports were classified as "extraordinary security" airports. The central regulation at issue in this case, ACSSP regulation XV C.1.(a), concerns the detection of unaccompanied bags. It directs an air carrier operating out of an extraordinary security airport to

> [c]onduct a positive passenger/checked baggage match resulting in physical inspection or noncarriage of all unaccompanied bags. The carrier may use either physical match or administrative match, but, in either case, it should be done in a way that passengers are aware of the use of the procedures.

Air carriers like Pan Am, thus were required under the regulations first to do a physical or an administrative match to detect unaccompanied bags, and then to physically inspect any unaccompanied bags before they could be loaded. ACSSP XV C clearly ordered that an air carrier operating out of an extraordinary security airport

"shall adopt and carry out the . . . special procedures except where local conditions preclude and alternative measures have been approved by the FAA."

Under ACSSP XV C.1.(a) the positive match is designed to ensure that any unaccompanied bags definitely will be identified as such. The regulation permits the positive match to be done either as a "physical match," in which passengers identify their bags on the tarmac, or an "administrative match," in which the number of passengers boarding the aircraft and the number of bags checked are compared with the number of bags to be loaded.

Pan Am claimed that it conducted an administrative match. Plaintiffs averred that this administrative match did not comply with the regulations because it was incomplete and failed to identify all unaccompanied bags. Particularly, plaintiffs point out Pan Am's procedures did not identify the bags of interline passengers, *i.e.*, those passengers who had transferred to a Pan Am flight from another airline and whose bags had been checked with the other airline at the passengers' point of origin.

If a match conducted under the regulations revealed unaccompanied bags, the regulations expressly directed the airline to conduct the second step of the process, "physical inspection," before it could carry the bags. ACSSP XV C.1.(a). Plaintiffs demonstrated that Pan Am and Alert x-rayed all bags transferred from other carriers—so-called "interline" bags—but conducted no other inspection of such bags. Pan Am and Alert assert that physical inspection could be interpreted to mean an x-ray inspection. For several reasons, we think this a strained reading of the unambiguous regulation.

First, the FAA promulgated "Physical Inspection Guidelines" in the ACSSP which specified that physical inspection involves opening and inspecting all compartments of baggage. The guidelines do not mention x-ray as an acceptable means of inspection. Second, the jury heard testimony from Pan Am's own General Manager

at Heathrow, and other witnesses as well, that physical inspection under the regulations involved opening up bags and that x-raying them did not satisfy the regulation. Third, ACSSP regulations applicable at other, lower security airports explicitly permitted x-ray *or* physical inspections. Thus, it is plain that the regulations applicable at Frankfurt and London's Heathrow were unambiguous: they did not permit x-ray inspections as a substitute for a physical inspection. Appellants' reliance on *United States v. Eastern Air Lines, Inc.*, 792 F.2d 1560, 1563 (11th Cir. 1986), is inapposite because that case involved a more broadly worded regulation, one suspectible to different interpretations.

We hold, therefore, that the district court did not err in refusing to allow witnesses—like the co-chair of the Pan Am Security Task Force, Richard Cozzi—to testify that they thought the regulations were ambiguous. As a matter of law, ACSSP XV C.1.(a) is not ambiguous in requiring a positve match and physical inspection of unaccompanied bags before they may be carried on board a departing plane. Introducing testimony to the contrary would have invaded the court's function of determining the law and instructing the jury as to that law. *See FAA v. Landy*, 705 F.2d 624, 632 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983).

2. *Proof of the Alleged Oral Waiver*

Given that the FAA regulation in question is not ambiguous, Pan Am next asserts it obtained an oral waiver of the regulation from the FAA and that the district court erred in disallowing evidence of that waiver. Evidence showed that as of April 1986 Pan Am established procedures to ensure that unaccompanied interline bags were not carried on its airlines. However, the process for identifying unaccompanied interline bags proved too "cumbersome" and expensive. Pan Am therefore stopped performing a match for interline bags in London in Feb-

ruary 1987 and in Frankfurt in July 1988. It also eliminated physical searches of unaccompanied interline bags. Thereafter bags were simply x-rayed and put on board, rather than matched against particular tickets. This was a violation of ACSSP XIV, which requires Pan Am to advise the FAA in writing if interline bag match has been discontinued.

It is apparent therefore from the record that Pan Am made no distinction on Flight 103 between interline accompanied versus interline unaccompanied bags. Most significantly, the Flight 103 pilot was not informed about the presence of unaccompanied interline bags, in violation of ACSSP XIII E. Pan Am managers allegedly instructed gate employees in London not to advise pilots of unaccompanied bags because it made crews "jittery."

What remains central to appellants' defense is their reliance on x-ray alone to inspect interline bags transferred to Flight 103. They sought to introduce evidence that at 1986 and 1987 meetings, mostly with unidentified FAA officials, oral permission was purportedly given to Pan Am to allow it to deviate from the ACSSP regulations. Because of that waiver, they contend, they were in compliance with FAA requirements. They thus sought to show that their noncompliance from the letter of the regulations was excused by an exemption.

Yet, the relevant regulations expressly require a *written application* for a waiver and *written FAA approval* based on certain findings. *See* 14 C.F.R. §§ 11.25, 11.27(e), 108.7(a)(2), 108.25(b)-(c) (1993); *see also* 49 U.S.C. §§ 1357(a)(2)(B), 1421(a)(6) & (c). The Director of the Office of Civil Aviation Security at the FAA at the time of the Pan Am bombing, Raymond Salazar, testified that in order to obtain an exemption from an ACSSP regulation an air carrier would have to file a written request and follow a specific procedure that was then in place. Salazar further denied ever granting an oral waiver to any Pan Am official or for that matter to any other air

carrier. His predecessor at the FAA, Billie Vincent, testified to the same effect that *written* authorization and approval were required for exemption from ACSSP requirements.

Salazar was asked by plaintiffs to testify whether he had ever granted an oral waiver to a Pan Am official. The purpose of the question was to get an explanation of a statement contained in a Pan Am electronic mail (e-mail) memorandum. Plaintiffs produced the e-mail message that Pan Am security officer Daniel Sonesen had sent to the regional Pan Am security representatives at Heathrow and Frankfurt. The e-mail message, dated March 28, 1988, stated in part, "the Dir. FAA R Salizar has granted x ray as and [sic] alternative to searching pass. baggage." Salazar testified that that representation was inaccurate and a misrepresentation, and when pressed by counsel, characterized it as "a faleshood."

Despite requirements that exemptions be in writing, Pan Am offered no proof that it had ever applied for a written exemption from the provisions of ACSSP XV C.1. (a) at Heathrow or Frankfurt. There was evidence that Pan Am had made written applications on other occasions for exemptions from ACSSP XV C.1, 2, and 3, indicating that Pan Am was aware of the proper procedure for requesting a waiver. Further, Pan Am's Chairman, Thomas Plaskett, admitted the airline knew waivers had to be in writing.

Although the FAA regulations occupied a key role in the trial of this case, it must be kept in mind that Pan Am and Alert's compliance with them is not dispositive of the outcome. As appellants acknowledge in their brief, and as the court instructed the jury, proof of full compliance with the ACSSP would not necessarily provide appellants with a complete defense against a claim of wilful misconduct. FAA regulations only establish minimum requirements for air carriers. A jury could conceivably find certain circumstances under which an air carrier had

committed wilful misconduct even though it followed FAA regulations to the letter. Similarly, noncompliance with ACSSP procedures will not necessarily lead to a *per se* finding of wilful misconduct. A carrier might not have acted with wilful misconduct, even were it to have failed to comply with an FAA regulation. The issue we are called upon to decide, thus, is whether evidence of Pan Am's alleged oral waiver should have been admitted by the trial court.

(a) *Proposed Testimony*

The excluded evidence concerning the oral waiver primarily involved the testimony of three witnesses. We are told that the first witness, Daniel Sonesen, would have testified that he approached the FAA in 1986 and received a verbal authorization for the x-ray-only inspection of interline bags, though he could not recall who gave this authorization. He would have testified further, so defendants state, that at an October 1987 meeting with Salazar and others he was advised that x-ray inspection would comply with ACSSP requirements. Sonesen's pretrial deposition testimony was before the district court, but we are unable to find in the record an express offer of proof of what his testimony would have been. Moreover, our faith in the defendants' versions of Sonesen's testimony is not enhanced by the fact that Sonesen's 1990 deposition testimony is substantially inconsistent with the representations made by the defendants before us. Simply put, the defendants refused to put Sonesen on the stand for their own reasons, and yet want us to accept at face value representations not made under oath, not subject to cross-examination, and in fact inconsistent with prior testimony made under oath. *See, e.g., Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972) (stating that appellate court will not "permit a party to allege on appeal what it failed to claim to the trial court," since that "would allow a party to obtain a new trial simply on its

claim that it would have proven a certain fact or facts had it been given a chance"); *Moss v. Hornig,* 314 F.2d 89, 93 (2d Cir. 1963) (holding that an appellate court cannot be expected to reverse where there was no offer of proof, and "where the significance of the evidence sought to be introduced is not obvious"); *Marrone v. United States,* 355 F.2d 238, 241 (2d Cir. 1966) (holding that the failure to make an offer of proof to demonstrate the significance of excluded testimony "must be held to be fatal," even where persuasive authority indicated that the district court should have allowed the testimony).

The second witness proffered by the defense was the former co-chair of the Pan Am Security Task Force, Richard Cozzi. Alhough Cozzi testified at trial, he was not permitted to testify as to Pan Am's purported verbal authorization from the FAA. Since his proposed testimony was preserved, we can see he would have testified that the Task Force in late 1986 wanted to find out if x-ray of interline bags would comply with the ACSSP, even though some members were doubtful it could comply; the Task Force instructed Sonesen to check with the FAA as to whether inspection by x-ray satisfied the ACSSP; and Sonesen reported back that he had done so and that the FAA said that x-ray inspection of interline bags would comply with the requirements. Even had Cozzi been permitted to testify on this issue, his statement respecting what Sonesen reported would have been inadmissible hearsay because it was offered for the truth of the matter asserted, to wit, that Salazar granted Pan Am a waiver of compliance with ACSSP XV C.1.(a). That Pan Am offered Cozzi's testimony for this purpose is clear from the record:

> MR. SHAUGHNESSY: You talked about what Mr. Sonesen told you about his discussions with the FAA. Do you have an opinion as to whether Mr. Sonesen was telling the truth?
>
> . . . .

> MR. COZZI: Yes. I certainly believed Mr. Sonesen was telling the truth. There was no reason for him not to.

The third witness was Pan Am's Chairman, Thomas Plaskett. Pan Am offered his testimony in an offer of proof, in which Plaskett stated that he did not recall having any conversations or information concerning whether the FAA had authorized Pan Am to use x-ray machines to examine luggage.

Additional evidence appellants sought, but were not allowed to introduce to show the supposed appropriateness of their procedures included testimony concerning a September 1988 FAA inspection at Heathrow at which Pan Am was not cited for violating ACSSP XV C.1.(a).

(b) *Trial Court's Rulings*

In a series of oral rulings repeated throughout the record, the trial judge stated that any testimony by defense witnesses as to the purported verbal authorization would be excluded. It treated the proffered evidence as an attempt to mount a so-called government authorization defense, the bounds of which will be discussed shortly. Chief Judge Platt believed that a government authorization defense may only be predicated on authorization from a government official with power to grant such authorization. He held the defense unavailable because anyone who might have given a verbal exemption at the FAA would have had no authority to do so. The trial court also observed that any evidence as to a verbal authorization would be irrelevant since Pan Am was charged with knowing the regulations, including those that stated amendments and exemptions to the regulations must be in writing.

Before analyzing the government authorization defense, we briefly discuss one of defendants' arguments for permitting the introduction of the verbal authorization defense: to rebut Salazar's statements concerning Sonesen's

e-mail message, which plaintiffs had introduced into evidence. A trial court may in the interests of fairness allow otherwise inadmissible evidence on an issue when necessary to rebut a false impression left by inadmissible evidence introduced by an opposing party. *See, e.g., United States v. Rea,* 958 F.2d 1206, 1225 (2d Cir. 1992). But whether to entertain such sort of proof is left squarely in the trial judge's discretion since the presider at trial is in a better position to assess how to conduct it fairly than is an appellate court reading the record.

Here the district court did not abuse its discretion in declining to admit the evidence for this purpose. It directly offered Pan Am and Alert a curative instruction, stating, "[o]n the so-called verbal authorization, . . . [i]f they want me to give the jury an instruction to disregard the testimony that came in at the outset of the case before I understood what the issue was, I will be glad to give that instruction." Since appellants refused to ask for that instruction, they waived any complaint as to harm they may have suffered due to Salazar's characterization of Sonesen's e-mail as inaccurate. *See United States v. Grubczak,* 793 F.2d 458, 461-62 (2d Cir. 1986).

Nor is there merit in Pan Am's contention that it was an abuse of discretion to exclude testimony regarding a September 1988 FAA inspection at which Pan Am was not cited for violations relating to its x-ray procedure. Other evidence that was before the jury showed FAA inspections of Pan Am operations at Heathrow and Frankfurt had not resulted in any FAA citations.

Now turning to the substantive question of whether the district court erred in refusing to allow any evidence regarding the oral waiver, the plaintiffs' argue initially that Pan Am failed to make a proper offer of proof with respect to the evidence they sought to introduce. Assuming without deciding that defendants sufficiently pre-

served their objection does not change the result, as we demonstrate below.

We note that the parties and the district court frame the legal issue they faced in different ways. Chief Judge Platt thought the offer of proof was an attempt by defendants to mount a government authorization defense. We believe the proffered proof also can be viewed as an attempt by defendants to invoke what is often referred to as a "mistake of law" defense. Defendants assert it was proof probative of defendants' states of mind.

(i) *Government Authorization*

Chief Judge Platt correctly ruled that a government authorization defense was not available to Pan Am and Alert. Such defense requires a demonstration of "legitimate reliance on an official interpretation of law." *See United States v. Durrani,* 835 F.2d 410, 422-23 (2d Cir. 1987). Under our case law, the official on whose interpretation the defendant allegedly relied must have actual authority. *See United States v. Duggan,* 743 F.2d 59, 83-84 (2d Cir. 1984) (mistaken belief that individual had apparent government authority did not warrant submission of defense to jury); *see also United States v. Schwartz,* 924 F.2d 410, 422 (2d Cir. 1991).

Here all the evidence demonstrated that amendments to or exemptions from ACSSP XV C.1.(a) had to be made in writing by the FAA following written application. Both Salazar and Vincent testified that as Directors of the FAA Office of Civil Aviation Security they did not have the authority to alter the ACSSP orally. The regulations support this view, as did testimony of Pan Am's own witnesses. Pan Am's attempted government authorization defense was therefore properly precluded by the district court because the FAA officials allegedly contacted simply did not have the actual authority to grant any verbal authorization for Pan Am's x-ray-only inspection of interline bags.

(ii) *Mistake of Law*

Viewed as a mistake of law defense, defendants offered the oral waiver evidence to show they thought what they were doing was in accordance with the law and, even if they were mistaken, under such a circumstance they should not be held liable for wilful misconduct. Yet, contrary to appellant's view, even were a mistake of law defense one that could be successfully interposed, it would not necessarily absolve Pan Am of liability in this Warsaw Convention case. The same standards governing the availability of mistake of law govern even when it might not supply a complete defense to liability—in this case, for example, the jury might have found that complying with the FAA minimum requirements was still inadequate under the circumstances on the ultimate issue of wilful misconduct. The usual standards defining the permissibility of a mistake of law defense are as effective where the mistaken law is a regulation. *See United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (noting "principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation").

In any event, the oral waiver evidence was inadmissible for purposes of showing that Pan Am's violation of the FAA regulation was the result of a mistake of law. It has long been a maxim that "ignorance of the law is no excuse." The reason for this ancient rule is not because everyone knows the law, but because ignorance of it is a ready excuse easily raised and difficult to refute. We and the Supreme Court regularly acknowledge that a mistaken view of the law usually will not serve as an acceptable defense. *Durrani*, 835 F.2d at 422; *Cheek v. United States*, 498 U.S. 192, 199 (1991). While cases where the rule is cited typically involve criminal offenses, *see, e.g., Cheek*, 498 U.S. at 199, it applies equally in civil cases. *See Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (Story, J.) ("It is a common

maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally . . . ."); *Ruley v. Nelson,* 106 F.R.D. 514, 518 (D. Nev. 1985) (noting ignorance of law is no excuse in civil or criminal law).

In *Cheek v. United States,* 498 U.S. 192 (1991), now a seminal case in the area, the Supreme Court declared that the term "wilfully" in federal criminal tax statutes carved out an exception to the general maxim that ignorance of the law is no excuse. *Id.* at 199-200. The Court said that the wilfulness requirement in the tax laws required the defendant to be allowed to introduce evidence as to any belief—no matter how objectively unreasonable that belief might be—tending to show an unawareness of a legal duty on defendant's part. *Id.* at 203.

In doing so, the Supreme Court carefully limited its decision to the tax field. It emphasized "the complexity" of the tax laws," 498 U.S. at 200, the difficulty of the "average citizen" in comprehending duties imposed by the tax laws, *id.* at 199, and constructions of the term "wilfulness" in the tax context, *id.* at 201. Our subsequent decisions and those of other courts acknowledge *Cheek*'s limited application. *See, e.g., United States v. Caming,* 968 F.2d 232, 240 (2d Cir.) (collecting other circuits' cases refusing to extend *Cheek* to non-tax criminal statutes), *cert. denied,* 113 S. Ct. 416 (1992); *cf. Ratzlaf v. United States,* 114 S. Ct. 655, 663 (1994) (not intending to "dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge" while allowing mistake of law defense in the specific context of criminal prosecutions for violations of the anti-structuring provision of the money laundering statutes).

We see no reason that would prompt us to view heavily regulated air carriers—certified by the FAA and charged with knowledge of the relevant statutes and regulations

under which they operate—the same as average citizens who face the daunting task of unraveling the complexities of the Internal Revenue Code. There is cause to be wary because of the ease with which air carriers could fabricate sham defenses and ignore with impunity safety regulations. *See United States v. Squires,* 440 F.2d 859, 864 (2d Cir. 1971) (stating "whenever a defense of ignorance of the law . . . is claimed, it is recognized that one may not deliberately close his eyes to what otherwise would have been obvious to him"). Accordingly, when a law, rule or regulation that pertains to passenger and crew safety is clear, we hold that an air carrier—one of the handful of corporations in the business of transporting the public by air—may not claim ignorance of the law as an excuse.

Our holding is narrow. We reiterate it to emphasize its limitations: in a case brought under the Warsaw Convention involving violations of FAA regulations that pertain to the safety of those aboard an aircraft, against a defendant air carrier charged with knowing and following those regulations, that air carrier may not mount a mistake of law defense. In the instant case, therefore, the evidence offered by Pan Am regarding its mistaken view of what was required by the ACSSP was inadmissible for the purposes of mounting a mistake of law defense.

(iii) *State of Mind*

Notwithstanding the foregoing, appellants insist the oral waiver evidence was admissible on the question of their wilful misconduct, which is of course the ultimate issue in this Warsaw Convention case, *see Ospina,* 975 F.2d at 37. In *Vinieris v. Byzantine Maritime Corp.,* 731 F.2d 1061 (2d Cir. 1984), we addressed the question of admissibility of evidence going to a defendant's state of mind in the context of a statute that required "conscious misconduct" be proven for a seaman to recover under the penalty provision in a wage-withholding statute. We held that "[n]o evidence which bore even remotely on [state of

mind] should have been kept from the jury, unless it interjected tangential and confusing elements which clearly outweighed its relevancy." *Id.* at 1064. This formulation is in some sense a restatement of the well-known balancing test contained in Rule 403 of the Federal Rules of Evidence.

Whether the problems to be anticipated by admission of the oral waiver evidence in the present case clearly outweighed the evidence's relevancy is a close question. Analysis of this issue cannot exist in a vacuum. Because the oral waiver evidence was so intertwined with the government authorization and mistake of law defenses, which as a matter of law were not available to defendants, we believe that admission of such evidence might well have been unnecessarily confusing and perhaps prejudicial so as to justify the trial court's refusal to allow its admission.

Nonetheless, even were it an abuse of discretion to deny admission of the oral waiver evidence on the foregoing grounds, we hold that such an error was harmless. An evidentiary ruling is harmless when we are fairly assured that it had no substantial effect on the jury's verdict. *See Rea,* 958 F.2d at 1220. In the instant case, the record is replete with evidence that wholly undermines Pan Am's claim of good faith. The overwhelming evidence presented during the course of the three and one-half month trial established that Pan Am officials ignored repeated warnings and signals that its security measures were insufficient.

The scope and nature of this evidence needs to be set forth in some detail. We begin in 1983 when a Pan Am flight leaving Rome, Italy for New York was the target of a bomb planted in an unaccompanied interline suitcase. Disaster was averted only when Turkish authorities conducted a passenger/bag match that uncovered the suitcase. Pan Am thus knew of this type of sabotage and that physical matches of suitcases were successful in averting such a terrorist act.

In 1985 a bomb hidden inside a radio and packed in an unaccompanied interline bag exploded on an Air India 747 over the North Atlantic, killing all aboard. The dangers of a bomb hidden inside radios packed in interline bags were well known to Pan Am and the airline industry. These two incidents not only led to the adoption of ACSSP XV.C.1(a), but they conveyed clear warnings that what actually happened at Lockerbie was a distinct possibility.

In September 1986 Pan Am received a report from a group of Israeli security experts commissioned to review Pan Am security at various airports, including Heathrow and Frankfurt. The security experts concluded that "under the present security system, Pan Am is highly vulnerable to most forms of terrorist attack. The fact that no major disaster has occurred to date is merely providential." The report specifically cautioned Pan Am on the use of x-ray machines as substitutes for physical searches, and the dangers of interline unaccompanied bags.

In October 1988 Alert Manager for Germany Ulrich Weber wrote a memo to New York headquarters citing the need for more personnel to remedy Frankfurt's security shortcomings. Only minimum efforts were made to remedy them.

In July 1988 the FAA issued a Security Bulletin warning of the high threat of a terrorist retaliatory attack because of the downing of an Iranian Jetliner. In November 1988 Pan Am received an FAA Security Bulletin warning that a raid on a terrorist group had uncovered a bomb built into a Toshiba radio cassette player. (Toshiba Warning). The bulletin warned that the bomb was difficult to detect by the use of normal x-ray.

The most wilful disregard of passenger safety, bordering on the outrageous, was in December 1988 when Pan Am received an FAA Security Bulletin advising that the United States Embassy in Helsinki had received a telephone warning that a Pan Am flight from Frankfurt to

London and on to New York would be bombed. (Helsinki Warning). The Helsinki warning came just 14 days before the instant tragedy and specifically referred to the Toshiba Warning. Despite these warnings, Pan Am failed to conduct searches of unaccompanied interline luggage, and instead inspected such bags only by x-ray. Pan Am did not even alert x-ray technicians to watch for Toshiba radios. It violated FAA regulations by failing to match the bags with particular tickets without advising the FAA in writing that interline bag match had been discontinued. And it violated other FAA regulations by failing to warn pilots about the unaccompanied bags on board for fear that the crews might become "jittery." Additionally, Pan Am did not replace several members of its security team who were woefully undertrained given their responsibility for thwarting terrorist attacks.

Moreover, the Helsinki Warning was deliberately placed under a pile of papers on the desk of the security officer who received the bulletin and was first discovered in the morning following the downing of Flight 103. There was also evidence that Weber, the security officer in charge, ordered the Pan Am employee who discovered the bulletin after the explosion to backdate the warning to give government investigators the impression that the warning was timely disseminated when received. The district court found that the backdating was evidence of consciousness of guilt on the part of Pan Am for its part in the wrongful causation of the crash.

This and other evidence overwhelmingly supported the jury's conclusion that but for Pan Am's wholly inadequate terrorist prevention techniques and its deliberate indifference and overt acts of wilfulness, the bombing and the senseless loss of life would not have occurred. Even had Pan Am been permitted to present Sonesen's deposition testimony to the jury, the above recited proof, plus the additional fact that any waiver of FAA regulations had to be in writing, make it plain to us that it would not have

affected the jury's finding that Pan Am was guilty of wilful misconduct. Its exclusion was therefore harmless error.

Consequently, for all of the above reasons, the district court's refusal to permit the admission of Pan Am's oral waiver evidence—on government authorization, mistake of law, and state of mind grounds—does not constitute a sufficient basis for the granting of a new trial.

B. *British Regulations*

Appellants' second contention regarding wrongful exclusion of evidence concerning wilful misconduct relates to British air safety regulations. Appellants sought to introduce British Department of Transportation documents and deposition testimony from James Jack, the Principal Aviation Security Advisor for the British Department of Transportation, in which he explained that Pan Am's reliance on x-raying interline bags would have complied with British security directives.

With respect to the exclusion of the documentary evidence there was no abuse of discretion. That evidence was proffered in the form of British Department of Transport documents and notably included circulars not having the force of law. In addition many of the documents were no longer in effect at the time of the accident. This proof was properly ruled inadmissible as irrelevant, vague, and remote.

The refusal to admit Jack's deposition is more problematic. The district court stated that it would not admit Jack's testimony about British regulations unless Pan Am and Alert stipulated that they had violated the ACSSP. Pan Am and Alert understandably refused to make such a potentially prejudicial stipulation. The trial court then suggested that Pan Am and Alert had to choose between claiming they followed the ACSSP or claiming that they violated it, but their wilful misconduct should be judged by local security regulations.

We agree with Pan Am that it was error to force them to choose between alternate defenses. Alternate and inconsistent defenses are permitted in civil trials. *See* Fed. R. Civ. P. 8(e)(2); *Mathews v. United States,* 485 U.S. 58, 64 (1988); *Kibby v. United States,* 372 F.2d 598, 601 (8th Cir.), *cert. denied,* 387 U.S. 931 (1967). The district court had no authority to exclude evidence on the ground that it supported a defense not consistent with Pan Am and Alert's alternate theory.

Nevertheless, though it was error to refuse to permit the few pages of Jack's deposition testimony to be read to the jury, it was harmless error. As we noted above, a ruling is harmless when we are fairly assured that admitting or refusing to admit certain proof had no substantial effect on the jury's verdict. *See Rea,* 958 F.2d at 1220. Here the district court did permit Pan Am to adduce some testimony that its conduct comported with British regulations. The jury had that point before it. Further, plaintiffs' case rested principally on Pan Am and Alert's ACSSP violations, not on whether appellants violated British government's security regulations. The bulk of the evidence regarding the x-ray procedures concerned the issue of ACSSP violations, the importance of conducting a passenger/bag match, and appellants' purported knowing or reckless behavior in failing to follow FAA regulations.

Moreover, Pan Am and Alert presented a strong defense to the jury that even if they violated the ACSSP, their actions did not amount to wilful misconduct. They insisted that a bomb contained in a suitcase would have been visible on x-ray. In fact, the parties stipulated to that fact. Appellants' counsel emphasized in closing argument and elsewhere the safety and expense of the x-ray technology purchased and employed by Pan Am, the fact that even an untrained person could spot a radio on one of their x-ray machines, and made the point that FAA inspections had shown Pan Am x-ray equipment to be in compliance with regulations. Dr. Grodzins, an MIT pro-

fessor, testified regarding the effectiveness of x-ray examination of baggage. It simply cannot be supposed on the entirety of the voluminous record that Jack's several pages of deposition testimony would have substantially influenced the verdict, given the fact that the closely related defense that Pan Am presented failed to persuade the jury.

C. *"Highest Threat" Evidence*

The last of the three wrongfully excluded wilful-misconduct-evidence assertions raised by Pan Am is the court's refusal to allow evidence that bombs in unaccompanied baggage did not pose the "highest threat" to airline safety. Appellants sought to introduce this evidence to refute the view of one of plaintiffs' experts that unaccompanied bags pose the greatest risk to airline security.

Pan Am and Alert sought to elicit testimony from their terrorism expert that unaccompanied bags do not pose the highest threat to airline safety; instead, unsuspecting couriers pose that threat. Plaintiffs' expert, Billie Vincent, had very briefly testified that the unaccompanied bag poses the "highest threat" to airline safety. The defense sought to rebut this position through their expert, Dr. Ariel Merari. They contend Vincent's testimony left a false impression as to Pan Am's degree of awareness of the probable consequences posed by unaccompanied baggage.

Although the district court did not admit the defense expert's testimony, it agreed to give an instruction that there was no evidence to show that unaccompanied bags posed the greatest security threat and that the jury should disregard any such opinion. Since such a curative instruction was given, any risk that Vincent's brief, qualitative testimony was improperly considered by the jury was removed. *See, e.g., United States v. Tutino*, 883 F.2d 1125, 1137 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081

(1990). Thus, no abuse of discretion resulted from the exclusion of further testimony on this peripheral subject.

II ADMISSION OF OTHER MISCONDUCT EVIDENCE BY PAN AM AND ALERT AND EXCLUSION OF PAN AM AND ALERT'S ALTERNATIVE SUGGESTIONS OF CAUSATION

Pan Am and Alert's second major line of argument concerns what it thinks was an error in the trial court's admitting other evidence of misconduct on their part, while at the same time excluding the testimony of several of their witnesses who, they assert, would have presented alternative theories of causation. We examine each of these challenged rulings separately.

A. *Evidence of Appellants' Alleged Other Misconduct*

Appellants complain of evidence received to show other acts of alleged misconduct by the airline. This evidence of Pan Am's and Alert's other misconduct is divided into two categories—SECURITY VIOLATIONS ON FLIGHT 103 and THE "ALERT" SECURITY PROGRAM. With respect to the former alleged misconduct, the proof was as follows: (1) Ulrich Weber, the head of Alert in Frankfurt had been convicted in the U.S. of passing bad checks eight years before he was hired by Alert and had been fired after the disaster at Lockerbie for using a company credit card in a brothel; 2) the ramp around Flight 103 had been left unguarded in violation of ACSSP when the Alert employee assigned to guard it felt ill and went inside; 3) Alert employees were inadequately trained, particularly employee Sabine Fuchs who could not explain what a "selectee" was even though her job was to pick "selectees" out from passengers for further screening; one security agent for Flight 103 was an "alternate" who had only two to three hours of training and did not know what the ACSSP required. She thought someone else was monitoring the baggage. 4)

Critical to this case is the fact that the x-ray technician for the flight, the only defense against the bomb, had been employed for only seven weeks, had no formal training, and had not been tested. He had never heard about the Toshiba warning.

The proof regarding THE "ALERT" SECURITY PROGRAM revealed first, that it was neither related to security, nor was it a program. Instituted by Pan Am in May 1986 during a period of sharp decline in international travel due to terrorist attacks, the program was a misleading public relations ploy designed to make would-be travelers feel more secure. An advertisement signed by Pan Am's chairman of the board an CEO was placed in the *New York Times* and other publications:

> Dear Air Traveler:
>
> On June 12, 1986, Pan Am will initiate one of the most far-reaching security programs in our industry, a program that will screen passengers, employees, airport facilities, baggage, and aircraft with unrelenting thoroughness.

The campaign also featured TV ads. As part of the program, Pan Am imposed a security surcharge on international passengers to pay for the promised additional security measures. The surcharge generated $18 million in annual revenue. The security surcharge was $5 each way on overseas tickets—many Flight 103 passengers paid the surcharge—but proceeds from the surcharge were not earmarked for security and instead were commingled with Pan Am's general funds. Alert's first president, Fred Ford, wrote a memo to Pan Am senior executives stating that the promised security program was not being put into effect and that passengers would complain "What do I get for my surcharge?"

The evidence revealed, second, that Alert added more guards during FAA inspections to make it appear that more guards were on duty than generally was the case;

this included on one occasion having a guard from the front end of an airplane sent to the back when FAA inspectors come on board so that the inspectors would think that there was a guard at both places. Third, in 1986 Pan Am declined to adopt security recommendations made to it by the Israeli security consulting firm, KPI, which criticized Pan Am's reliance on x-ray and emphasized Pan Am's vulnerability to terrorist attack. Fourth, untrained sniffing dogs had been paraded in front of ticket counters at Kennedy airport to create an appearance of security which did not otherwise exist.

Appellants' motion to exclude proof not tied to the Air Malta theory of causation (that the bomb bag came from an interline transfer) was denied by the trial court. It observed that since appellants planned to contest the Air Malta theory, plaintiffs were entitled to present evidence of alleged other misconduct on defendants' parts. The trial judge reasoned that even if the Air Malta theory did not explain the bomb's presence on Flight 103, other pervasive and extensive wilful misconduct by defendants must have accounted for the bomb's presence. Following this general ruling, no specific objections were made to the individual pieces of evidence listed above on any other grounds. Other objections that might have been raised were waived. Accordingly, we review this as a general ruling permitting the introduction of evidence showing prior misconduct, unrelated to the Air Malta theory.

This proof that Pan Am acted with wilful misconduct through recklessly disregarding passenger safety in general, with knowledge of the probable consequences of that disregard, was properly received. Although Fed. R. Evid. 404(b) provides for the exclusion of prior misconduct evidence in order to show "character" or action "in conformity therewith", we follow the inclusionary approach to prior misconduct evidence that allows the admission of prior misconduct for any other relevant purpose. *Ismail v. Cohen,* 899 F.2d 183, 188 (2d Cir. 1990).

Plaintiffs asserted that a contempt for security pervaded Pan Am from the highest to the lowest levels of the corporation, and that the totality of security failures would permit the jury to infer wilful misconduct. We have approved consideration of the totality of a defendant's wrongdoing in determining whether wilful misconduct existed. *See Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1164 (2d Cir. 1978), *cert. denied,* 440 U.S. 959 (1979); *see also United States v. Daly,* 842 F.2d 1380, 1388 (2d Cir.) (background evidence may be introduced to "furnish an explanation of the understanding or intent with which certain acts [are] performed"), *cert. denied,* 488 U.S. 821 (1988).

Pan Am insists that causation was not established and that therefore the objected to wilful misconduct evidence was speculative and unrelated as a cause of the crash. We think the question of whether it had a causative effect was, without objection or exception, properly submitted to the jury. In other areas of the law, causation may be established when an increasing number of defendant's faults creates an inference that the totality must have caused the harm. *See In Re Marine Sulphur Queen,* 460 F.2d 89, 99-100 (2d Cir.), *cert. denied,* 409 U.S. 982 (1972); *see also Capellini v. McCabe Powers Body Co.,* 713 F.2d 1, 5 (2d Cir. 1983) ("decisive consideration in assessing the sufficiency of . . . evidence of causation is the 'relative probability' of 'possible explanations' for the accident, and the 'legal inferences that can most reasonably be drawn from the most probable ones' "). In libel cases, for example, recklessness causing harm may be demonstrated by cumulative inferences. *See Goldwater v. Ginzburg,* 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970).

We do not hold that as a matter of law the evidence in this case required the jury to agree with the plausibility of a theory that Pan Am and Alert's misconduct was so

reckless it must have caused the bomb to go undetected. We say only that under the Warsaw Convention wilful misconduct causing an accident may be established by inference from the totality of the circumstances. *Accord In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1481 (D.C. Cir.) (sufficient evidence existed "from which to decipher a pattern of conduct giving rise to liability"), *cert. denied*, 112 S. Ct. 616 (1991).

This conclusion does not mean that any of the burden of proving causation was lifted from plaintiffs. It remained plaintiffs' duty to prove causation under whatever theory they pursued. In this connection, the district court carefully and in an extensive and well balanced charge instructed the jury that it must find not only wilful misconduct, but also a causal connection between that misconduct and the passengers' deaths. Chief Judge Platt added that defendants' conduct would not be proximate cause of the accident if the accident would have occurred anyway, absent defendants' acts or omissions. Since the evidence introduced by the plaintiffs related to such a showing of causation, there was no error in its receipt.

B. *Evidence Challenging Plaintiffs' Causation Theory*

Various attempts by appellants to suggest other specific causation theories were then rebuffed by the trial court. Pan Am and Alert challenge the exclusion of the testimony of four defense witnesses: two offered as experts on terrorism, Noel Koch and Dr. Ariel Merari, and two offered as experts on terrorist bombings, Peter Gurney and John Horne of Scotland Yard. Pan Am also contends it was error to restrict its cross-examination of plaintiffs' experts, Billie Vincent and Rodney Wallis (the former Director of Security for the International Air Transport Association), with respect to other methods of bombing. The trial judge based his rulings largely on the fact that he found appellants had offered nothing to show there was any other specific bombing theory.

The admission or exclusion of expert testimony rests soundly in the broad discretion of the trial court. Fed. R. Evid. 702; *Hamling v. United States,* 418 U.S. 87, 108 (1974); *United States v. Gigante,* 729 F.2d 78, 83 n.2 (2d Cir.), *cert. denied,* 467 U.S. 1206 (1984). That court may, in its discretion, refuse to entertain expert testimony it thinks unhelpful, cumulative, confusing to the jury, or more prejudicial than probative. *See* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 702[02], at 702-18 to -20 (1993). Expert testimony as to causation may be excluded, particularly where it is speculative and conjectural. *See Washington v. Armstrong World Indus., Inc.,* 839 F.2d 1121, 1123-24 (5th Cir. 1988) (court within discretion excluding expert's testimony where expert never examined plaintiff but relied on other expert's examinations and such testimony as to cause of death was "pure speculation"); *Hull v. Merck & Co., Inc.,* 758 F.2d 1474, 1477-78 (11th Cir. 1985) (trial court did not abuse discretion in excluding medical expert's deposition as to cause of plaintiff's disease because assumptions made seemingly firm opinion speculative and irrelevant); *Atlantic Mut. Ins. Co. v. Lavino Shipping Co.,* 441 F.2d 473, 475 (3d Cir. 1971); *cf. Novak v. United States,* 865 F.2d 718, 722 (6th Cir. 1989) (error to rely on expert's speculation to find causation); *Jones v. Goodlove,* 334 F.2d 90, 94 (8th Cir. 1964) ("[A] trial court may abuse its discretion by allowing a seemingly qualified expert to exceed the permissible bounds of opinion testimony and enter into the realm of utter speculation and conjecture.").

The trial court did not abuse its discretion in excluding the testimony of defense experts Koch and Merari because their conclusions as to more likely explanations for the bombing were speculative. Any testimony as to some other particular method of bombing—without any foundation that such method might explain the Flight 103 bombing—was clearly conjectural.

Further, appellants admit in their brief that they "did not undertake to prove what method the terrorists used to bomb the aircraft . . . [but] contended that the method of bombing has not yet been established." Because there was no evidence presented with respect to other possible methods of causation that might explain how this tragic event occurred, and because appellants never sought to show that any other specific method of bombing could have caused it, any testimony relating to such other causes would necessarily be speculative. Although Dr. Merari and Noel Koch would also have provided general background information on terrorism, the determination whether or not this testimony would have been helpful to the jury rested squarely within the trial court's discretion. *See* Fed. R. Evid. 702.

Discretion was also properly exercised in limiting appellants' cross-examination of plaintiffs' experts to scenarios that had evidentiary support in the record. Cross-examination of plaintiffs' experts as to other causation theories—absent a good-faith basis to believe those theories had evidentiary support—was properly excluded. Trial courts possess wide discretion in limiting cross-examination, *see N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp.*, 590 F.2d 415, 421 (2d Cir. 1978), and here the precluded questions could have drawn the jury into misleading conjecture. Pan Am and Alert were permitted lengthy cross-examination of plaintiffs' experts, and were only barred from suggesting, without basis, that other scenarios caused the bombing.

It was also not error to decline to receive the testimony of terrorist bombings experts Peter Gurney and John Horne. Their testimony as to the importance of x-rays would have been cumulative since similar testimony was adduced from other witnesses. Additionally, these witnesses' expertise as to x-rays was questionable. Both witnesses were explosives officers with Scotland Yard who specialized in street bombings. Neither had experience in aviation bombings or security. Moreover, neither had any

background or knowledge concerning the Flight 103 bombing itself; the trial court found this rendered their proposed testimony unhelpful and largely irrelevant. This ruling was well within the trial court's Fed. R. Evid. 702 discretion.

Contrary to appellants' suggestions throughout their briefs, Pan Am and Alert were not thereby prevented from presenting a defense on causation. Pan Am and Alert's summation focused at length and in detail on criticizing plaintiffs' causation theory; this remained Pan Am and Alert's main theme throughout cross-examination and their defense case as well. They vigorously attacked major and minor pieces of evidence alike. They were permitted to argue the possibility that a "rush-tag" bag, one by definition sent by the airline apart from its owner, was the unexplained, unaccompanied 13th interline bag x-rayed by operator Kurt Maier in Frankfurt. Importantly, appellants did not offer fact witness to testify as to another method of bombing that might have caused Flight 103's crash.

Appellants admit that at trial they sought to argue that the method of bombing was not established and concede they were unable to suggest a specific alternate theory. They vigorously argued that the method of bombing was unclear, and accomplished this through extensive cross-examination of plaintiffs' experts. Pan Am and Alert also were not deterred from attacking plaintiffs' weaker theory that widespread misconduct on defendants part more likely than not caused the bomb to be loaded on Flight 103. In sum, Pan Am and Alert exercised the ample opportunities given them to undermine plaintiffs' causation theory. Thus, the rulings limiting cross-examination and expert testimony were unremarkable and without error.

III OTHER EVIDENTIARY RULINGS

While appellants raise an array of objections to other evidentiary rulings—some of which patently involved

judgment calls by the trial judge—none of them amount to reversible error.

A. *Plaintiffs' Experts' Testimony*

Appellants' first objection is to the testimony of plaintiffs' expert witnesses, Rodney Wallis and Billie Vincent. Wallis and Vincent gave their opinions relying on evidence adduced at trial, at times displaying for purposes of reference trial transcripts on a projection screen. Based on this testimony, for example, Wallis opined that Pan Am was operating under a commercial rather than security priority and that training requirements had been violated. Vincent stated—again based on other record testimony—that Pan Am had committed acts that violated ACSSP XV C.1.(a).

Pan Am insists the Wallis and Vincent testimony involved improper summaries of evidence. But the cases relied on for support are inapposite because they do not address experts' summarizing record evidence, but rather they address summaries of evidence of the sort covered under Fed. R. Evid. 1006. *See, e.g., Fagiola v. National Gypsum Co. AC & S., Inc.*, 906 F.2d 53, 56-57 (2d Cir. 1990); *United States v. Conlin*, 551 F.2d 534, 538-39 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977). Rule 1006 provides in part, "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." It is of some significance that neither Wallis nor Vincent was giving the type of summary testimony that appears on a chart or graph.

The trial judge, therefore, properly ruled on the summary testimony under the federal rules governing expert testimony rather than under Rule 1006. Under those rules, expert testimony may be based on other testimony or evidence obtained at trial. *See* Fed. R. Evid. 703

("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."). No error occurred from the format of testimony summarizing the trial record or from the use of transparencies to highlight portions of the trial transcripts to which the witnesses referred when they were on the witness stand.

Wallis' and Vincent's summaries of testimony in the record did not, as appellants assert, improperly impinge on the jury's functions. Pan Am avers that in assessing other witnesses' testimony, Wallis and Vincent made credibility judgments that are properly reserved to the jury. They rely for this contention on *United States v. Scop*, 846 F.2d 135, 142, *modified*, 856 F.2d 5 (2d Cir. 1988). There, as it was said *in dicta* that one witness may not offer an opinion based on his or her assessment of the accuracy of another witness, where that other witness' credibility is to be determined by the trier of fact. *Id.* Even were *Scop's* discussion of this point binding on us—and it is not—*Scop* does not in any event, control the outcome of the present case.

Wallis' and Vincent's testimonies were not improper simply because they were based on the testimony of others. Precedent has long acknowledged the acceptability of expert testimony based on the trial record. *See, e.g., United States v. Johnson*, 319 U.S. 503, 519-20 (1943). No doubt remains under the federal rules that an expert may testify based on facts elicited at trial. *See* Fed. R. Evid. 703. The rules also provide, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). The credibility of a witness represents just such an ultimate issue normally decided by the jury.

Nor are we troubled by Vincent's testimony that he thought appellants engaged in "fraud" and "deceit," be-

cause it was clear from the content of his direct and cross-examination that he used those terms in a non-legal sense. Neither do questions arise as to the propriety of testimony given by Wallis, because appellants highlight no specific statement by him containing a legal conclusion as to a specific ACSSP violation. Additionally, because Wallis had an extensive background in aviation security it was not an abuse of the trial court's discretion to permit him to testify regarding causation.

Pan Am's next contention has greater merit. It declares that plaintiffs' witnesses improperly offered legal opinions as to ACSSP violations. We agree that Vincent's statement as to his belief that Pan Am violated the ACSSP is dubious. While an expert witness may testify as to an ultimate fact issue the jury will decide, *see* Fed. R. Evid. 704, the general rule is that an expert may not testify as to what the law is, because such testimony would impinge on the trial court's function. *See FAA v. Landy,* 705 F.2d 624, 632 (2d Cir.), *cert. denied,* 464 U.S. 895 (1983). Permitting an expert to give a legal conclusion may implicitly provide a legal standard to the jury. *See generally Hygh v. Jacobs,* 961 F.2d 359, 363-64 (2d Cir. 1992); 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 704[02], at 704-11 to 13 (1993). Thus, expert testimony expressing a legal conclusion should ordinarily be excluded because such testimony is not the way in which a legal standard should be communicated to the jury. Vincent's testimony that he had been lead to the conclusion "that Pan Am did indeed violate the ACSSP" embodied a legal conclusion that crossed the fine line between a permissible conclusion as to an ultimate issue of fact and an impermissible legal conclusion.

Having said this much, we hasten to add that the introduction of Vincent's statement was not in our view a reversible error. First, defendants took no specific objection to this statement. By failing to object when the

statement was made, the objection was waived. *See* Fed. R. Evid. 103(a)(1). Second, even had an objection been timely made, the error was harmless. *Cf. Hygh,* 961 F.2d at 364 (testimony on ultimate legal conclusion found harmless). Vincent's testimony directly conveyed to the jury that he was stating his own conclusion, it represented but a small portion of extensive testimony providing the basis for his opinion, and the trial judge instructed the jury that it was the ultimate judge of credibility and liability. Under the circumstances, this error—even had there been a proper objection raised—was harmless.

B. *Detective Constable Henderson's Testimony*

Scottish Detective Constable Derek Henderson provided deposition testimony as to his work in the Flight 103 investigation. He was assigned responsibility for matching certain bags—the ones that might have been placed in the flight container that was determined to have held the bag with the bomb—with passengers on the aircraft. Henderson prepared his report largely through compiling computerized records of bags. These computerized records had been set up to amass reports from passengers' and crew members' friends and relatives, and from evidence obtained at the scene of the crash.

Appellants object to the admission of the detective's testimony and his report. Based on his analysis of passenger records and information obtained from passengers' and crew members' friends and relatives, Henderson determined that the Samsonite bag containing the bomb was an unaccompanied bag from the Frankfurt flight. Defendants moved to exclude his reports as based on multiple layers of hearsay; Henderson had compiled his reports based upon other officers' reports of interviews they had conducted in this necessarily lengthy and involved investigation.

We believe the evidence was properly received under Fed. R. Evid. 803(8)(C), which provides an exception

to the hearsay rule for reports of public agencies containing "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." *See also Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 167 (1988) (upholding broad admissibility of facts in government reports, unless circumstances demonstrate lack of trustworthiness). The determination as to any lack of trustworthiness remains one properly left to the district court, *id.,* and its decision to admit a report under Fed. R. Evid. 803(8)(C) is one that we will uphold absent a manifest error. *See Gentile v. County of Suffolk,* 926 F.2d 142, 151 (2d Cir. 1991).

Here there was no explicit finding of trustworthiness, but no such finding is required before an official report under Rule 803(8)(C) may be received. The plain language of the rule establishes general admissibility, unless a report is deemed to be untrustworthy. *See* Fed. R. Evid. 803(8) advisory committee's note; *Kehm v. Procter & Gamble Mfg. Co.,* 724 F.2d 613, 618 (8th Cir. 1983). The district court carefully examined the report and did not make a finding of a lack of trustworthiness. Although the trial court did provide a detailed consideration of reliability concerns, it had no duty to state it found the report trustworthy.

In any event, adequate evidence demonstrates trustworthiness in the case at hand. The Advisory Committee's Note on Rule 803(8) suggests several factors to consider in determining trustworthiness: 1) timeliness of the investigation, 2) the investigator's skill or experience, 3) whether a hearing was held, and 4) possible bias or motivation problems in the report. *See* Fed. R. Evid. 803(8) advisory committee's note. The investigation was timely, Henderson was an experienced and skilled investigator, and no bias may be presumed in the Scottish investigation. We cannot say the trial court abused its discretion in entertaining the report, particularly given its cautionary instructions to the jury concerning the report.

C. X-Ray Demonstration of Radio-Cassette Player

Pan Am and Alert also sought to include an x-ray demonstration as part of their defense to show how clearly a radio-cassette player would appear on the screen. Such a demonstration was ultimately ruled irrelevant, given plaintiffs' offer to stipulate that a radio-cassette player would be visible on an x-ray screen. Pan Am and Alert nevertheless declare the demonstration would have generally supported Pan Am x-ray operator Kurt Maier's testimony that he x-rayed all the interline bags transferred to Fight 103 in Frankfurt.

The x-ray demonstration would not have either shaken or bolstered Maier's testimony since he said he could not remember whether any radios or cassette players appeared in any of the bags on Flight 103. More important, because plaintiffs stipulated that a radio cassette player would be clearly recognizable in an x-ray image the proffered demonstration would have been cumulative, and therefore inadmissible in the district court's discretion under Fed. R. Evid. 403. When a fact is undisputed and conceded, evidence attempted to be introduced to prove such fact may be excluded. *See United States v. Edwards,* 631 F.2d 1049, 1051, *aff'd,* 633 F.2d 207 (2d Cir. 1980). Although some cases have upheld the admission of proof respecting a conceded fact, the decision whether or not to do so is a matter that rests within the discretion of the trial court. *See, e.g., United States v. Gantzer,* 810 F.2d 349, 351 (2d Cir. 1987).

IV. DAMAGES FOR LOSS OF SOCIETY AND COMPANIONSHIP

Pan Am and Alert's last claims of error concern the damage awards. In each of the three cases whose damages phases were tried the jury was permitted to award compensatory damages to the decedent's spouse and children based on the loss of financial contributions, loss of services, loss of society and companionship, and loss of

parental care. Appellants do not dispute the awards for the first two elements. But they contend that loss of society and companionship damages are not available under the Warsaw Convention, and that damages for the loss of parental care should not be available to adult children of crash victims.

As we noted in *Lockerbie I*, damages in a Warsaw Convention case are governed by federal common law principles consistent with the Convention's terms. *Lockerbie I*, 928 F.2d at 1278-79; *see also Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1989) ("damages are to be measured according to the internal law of a party to the [Warsaw] Convention"). Article 17 of the convention provides for recovery of compensatory damages. *See* Warsaw Convention, art. 17; *Lockerbie I*, 928 F.2d at 1280-81. The first damages question to be analyzed is whether compensatory damages under the Convention include damages for loss of society and companionship. This question is answered by an examination of maritime law, which is probably the oldest body of federal common law. *See In re Mexico City Aircrash*, 708 F.2d 400, 414-15 (9th Cir. 1983) (looking to general federal maritime law in holding that the Warsaw Convention creates a cause of action for wrongful death).

Appellants agree that maritime law is an appropriate source of law for resolving this issue. But they would have us look only to maritime cases brought under the Death on the High Seas Act, 46 U.S.C. §§ 761-68 (DOHSA), and the Jones Act, 46 U.S.C. App. § 688, which preclude recovery for loss of society damages. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990). General maritime law cases that are not bound by a statutory restriction, in contrast, allow recovery for loss of society. *See, e.g., American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 280-83 (1980); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585-88 (1974).

The distinguishing feature in these cases is that the statutes, under which cases precluding loss of society damages have been brought, either expressly limit (DOHSA) or have been interpreted to limit (Jones Act) damages to pecuniary loss. *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 620-25 (1978) (loss of society damages are not recoverable under DOHSA because Congress explicitly limited survivors' recovery to their "pecuniary losses"); *Miles,* 498 U.S. at 31-32 (loss of society damages are not recoverable under Jones Act because in incorporating the Federal Employer's Liability Act "Congress must have intended to incorporate the pecuniary limitation on damages as well").

Because we cannot resolve this issue by reference to the common law alone, in light of the conflict between the statutory cases that deny loss of society and the general maritime cases that, along with the majority of states, permit recovery of damages for loss of society, we must look to the Convention itself to determine which of the maritime rules—statutory or general—is most consistent with the language used and the intent of the parties to the treaty. Analyzing Article 17 of the Convention, we look first to its text. The Warsaw Convention has to be evaluated by examining the governing text as drafted in French. *See Eastern Airlines, Inc. v. Floyd,* 111 S. Ct. 1489, 1493 (1991); *Air France v. Saks,* 470 U.S. 392, 399 (1985). The English language translation of Article 17 simply provides, in relevant part, "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . . ." The original text of Article 17 provides for compensation for "dommage survenu;" the accepted English language translation of this phrase is "damage sustained." *See* Warsaw Convention, art. 17; 49 U.S.C. § 1502 app. note (1988). No limit to pecuniary loss appears in the text. The aim of the Convention's drafters and signatories appears from the simple language of the text to provide full compensatory damages for any injuries or death covered by the Convention. *See In Re*

Korean Air Lines Disaster, 932 F.2d at 1486-7; *Lockerbie I,* 928 F.2d at 1281.

While our sources from which to determine the signatories' intent is limited, scholarly treatises on the subject agree that the French civil law recognized all sorts of damages, pecuniary and nonpecuniary. *See In re Korean Air Lines Disaster,* 932 F.2d at 1487 (citing G. Miller, *Liability in International Air Transport* 112 (1977) and R. Mankiewicz, *The Liability Regime of the International Air Carrier* 157 (1981)). We encountered no understanding in French law that might support limiting "dommage survenu" to exclude loss of society awards.

In light of the broad language in the Warsaw Convention covering "damage sustained" and the lack of authority suggesting that the drafters wanted to limit compensatory damages to pecuniary loss, we are informed by general maritime law principles set forth in *Gaudet* and its progeny and hold the Warsaw Convention permits damage awards for loss of society and compansionship. *Accord In re Korean Air Lines Disaster,* 814 F. Supp. 592, 597-98 (E.D. Mich. 1993); *In re Korean Air Lines Disaster,* 807 F. Supp. 1073, 1086-88 (S.D.N.Y. 1992). Such holding does not completely dispose of the loss of society damages issue, because the district court did not in any way limit who was entitled to loss of society damages.

Gaudet and *Alvez* allowed spouses to recover for loss of society. *See* 414 U.S. at 574, 587-88; 446 U.S. at 276. In doing so, the *Alvez* court noted that this was consistent with the majority of states' permitting recovery to a wife for loss of consortium, which incorporates loss of society, from personal injury to her husband. *See* 446 U.S. at 284 & n.11. Lower federal courts have read these cases to permit dependents to recover as well as spouses for loss of society damages. *See Miles v. Melrose,* 882 F.2d 976, 989 (5th Cir. 1989), *aff'd* 498 U.S. 19 (1990); *Sistrunk v. Circle Bar Drilling Co.,* 770 F.2d 455, 458-59 (5th

Cir. 1985), *cert. denied,* 475 U.S. 1019 (1986); *Anderson v. Whittaker Corp.*, 692 F. Supp. 734, 770-71 (W.D. Mich. 1987), *aff'd in part, rev'd in part,* 894 F.2d 804 (6th Cir. 1990); *Truehart v. Blandon,* 672 F. Supp. 929, 932-33 (E.D. La. 1987), *rev'd on other grounds,* 884 F.2d 223 (5th Cir. 1989). *But see De Loach v. Companhia De Navegacao Lloyd Brasileiro,* 782 F.2d 438, 441-43 (3d Cir. 1986) (declining to permit dependent child to recover loss of society damages).

We find no maritime case extending loss of society damages to plaintiffs other than spouses and dependents. We therefore affirm the loss of society awards to the Bainbridge and Porter families, since these families consisted of only spouses and dependant children. But the loss of society award to the Pagnucco family must be vacated since some of the family members were adult children and may or may not have been dependents. We remand this limited issue as it applies to the Pagnuccos to the district court for further proceedings consistent with this opinion.

On the issue of damages for lost parental care, we also must vacate and remand all three plaintiffs' cases to the district court because the district court erroneously instructed the jury on this issue. Damages for lost parental care are considered a pecuniary loss and are therefore recoverable. *See Gaudet,* 414 U.S. at 585. Appellants correctly contend the district court erred in declining to instruct the jury that damages for loss of fatherly care and guidance must be limited to the period of a child's minority, absent a showing of specific circumstances that the father's "guidance had a pecuniary value beyond the irreplaceable values of companionship and affection." *First Nat'l Bank in Greenwich v. National Airlines, Inc.,* 288 F.2d 621, 624 (2d Cir. 1961). Since no such limitation was charged to the jury on this damages issue, the jury awards for loss of parental care may not stand.

On remand, the district court should instruct the jury that it may take into consideration the care, attention,

instruction, training, advice, and guidance the evidence shows the father might reasonably have been expected to give his children and to include the pecuniary value thereof in the damages it assesses. The damages for such loss must be limited to the period of a child's minority, absent a showing of specific circumstances that the father's guidance had a pecuniary value beyond that period.

CONCLUSION

The record of this trial is not a paradigm of a perfect trial. The critical question though is whether the trial was fair. Here we are satisfied upon an examination of the entire record that defendants received a fair trial. Accordingly, the jury verdicts as to liability are affirmed. However, the award for loss of society damages to the Pagnucco family is vacated as are the awards for loss of parental care in all three plaintiffs' cases. These cases are remanded to the district court for further proceedings on the outlined damage issues consisent with this opinion.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

As I said when writing my dissent to the original majority opinion, writing a dissenting opinion in the instant case is not a pleasant task. My name will be anathema to the hundreds of people who are seeking recoveries probably in excess of $1 billion, and my long-time friendship with Judge Platt may suffer some stress. However, because I am convinced that Pam Am [1] did not receive a fair trial, I would be shirking my duties as a judge if I did not say so. Before undertaking the unpleasant task of discussing where I believe the district court erred, I find it necessary to undertake the even more unpleasant task of commenting briefly upon my colleagues' amended opinion,

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[1] **The dissent will hereinafter refer to defendants Pan American World Airways, Inc. and Alert Management Systems, Inc. as Pan Am or defendant.**

a substantial portion of which is devoted to a rebuttal of arguments that Pan Am never made.

Under the heading "The Alleged Oral Waiver" my colleagues state:

> Defendants maintain that an FAA official granted them an oral waiver excusing strict compliance with certain FAA regulations, and that Chief Judge Platt abused his discretion when he disallowed their evidence purporting to demonstrate their belief in this waiver.

The fact of the matter is that Pan Am made absolutely no claim of waiver. It argued, and offered testimony to prove, that what it sought and obtained from FAA officials was not a waiver, but an "interpretation" of what it deemed an ambiguous regulation. One of the tasks of Raymond Salazar, Director of Civil Aviation Security, and his staff was to promulgate regulations and thereafter to interpret them:

> In that capacity we would—we, me, my staff would promulgate regulations, would provide interpretations, . . .

Tr. 1254 (Salazar testimony). Interpretations of regulations were not required to be in writing. *See United States v. Eastern Air Lines, Inc.*, 792 F.2d 1560, 1564 (11th Cir. 1986). Richard Cozzi, Pan Am's Director of Airport Security, described the practice as follows:

> Q Is it your understanding, sir, that before a change can be made to the ACSSP there has to be an application in writing to the FAA?
>
> A Yes.
>
> Q And that only when there is a written process of an application and an approval by the FAA, that the terms of the ACSSP can be changed?

A That's true if an airline is requesting a waiver or something of that nature, yes. Not for an interpretation.

Tr. 5624-25.

As will be discussed below, the district court clearly erred in rejecting all evidence offered by Pan Am in support of its contention that it received and relied upon an oral interpretation from Salazar. Although my colleagues devote seventeen pages of their amended opinion to a discussion of the "oral waiver," "government authorization," and "mistake of law" defenses, none of these defenses was asserted by Pan Am or is relevant to the pertinent issue herein.

The following excerpt from the index of Pan Am's brief is an accurate statement of the contentions that Pan Am actually made:

Introduction and Summary 21

I. THE DISTRICT COURT ERRONEOUSLY EXCLUDED EVIDENCE SHOWING THAT PAN AM LACKED THE STATE OF MIND NECESSARY FOR A FINDING OF WILFUL MISCONDUCT 23

A. The Court Erroneously Excluded Evidence That Pan Am Believed That It Had Obtained An FAA Interpretation That X-Ray Inspection Complied With The ACSSP 25

1. *The Evidence of the Oral Interpretations Was Admissible to Show that Pan Am Did Not Have the State of Mind Necessary for a Finding of Wilful Misconduct* 26

2. *The Evidence of Oral Interpretations Was Admissible to Show Pan Am's Compliance with the ACSSP* 29

a. *The District Court Relied on Inapposite Decisions* 29

b. *No Written Application Was Required to Obtain an FAA Interpretation* 31

Finally, on page 25 of their amended opinion, my colleagues come to the question of the defendant's "State of Mind," which they acknowledge to be "the ultimate issue in this Warsaw Convention case." The following excerpt from Mr. Cozzi's excluded testimony will demonstrate exactly how the "ultimate issue" was reached and resolved and why the district court erred in not permitting the jury to hear the testimony:

> Q When did the discussions of the Security Task Force take place?
>
> A Discussions concerning the possibility of using x-ray to satisfy the ACSSP on interline baggage took place at the very first or at least second Security Task Force meeting.
>
> The Security Task Force team was charged with writing sealed procedures, our developing manuals, and one of the very first things that Security Task Force needed to know is that did x-ray of interline baggage satisfy the ACSSP.
>
> Q And what was done in that respect?
>
> A That question was presented to Mr. Dan Sonesen, and I must say that his first reaction was doubtful.
>
> However, we requested that he contact our PSI [FAA Principal Security Inspector] or whatever level was required within the FAA, and to report back to the task force as to whether x-ray met that intent.
>
> At a subsequent meeting, Mr. Sonesen—

MR. POUNIAN: Your Honor, I just want to note our objection on the record for hearsay from Mr. Sonesen.

THE COURT: Yes. It's not admissible.

MR. SHAUGHNESSY: May I continue?

THE COURT: Yes.

Q Go ahead.

A Mr. Sonesen reported back at the subsequent task force meeting that he had had conversation with the FAA and requested interpretation of intent and he came back and told us that, yes, x-ray did in fact satisfy that section of the ACSSP.

Q Why did the task force seek this clarification?

MR. POUNIAN: Objection to the question, as clarification, your Honor. I think that it's improper.

THE COURT: That's the way they regard it, as a clarification of a statement that positive matching was required. That's their interpretation.

MR. POUNIAN: I just think that it's leading, your Honor, in the context.

THE COURT: Sure, it is.

Q Why did you seek this clarification, Mr. Cozzi?

A We needed this clarification because the task force was charged with writing manuals and developing procedures, and we needed to know what direction those manuals and procedures were to take.

Q And were you anxious to have x-ray approved under Section XV.C.1.A.?

A We were not anxious to have x-ray approved. We just needed to know what direction we were going in: if it had come back that it was not

approved, then we would have developed procedures without utilizing x-ray.

As it turned out, we were told that it was approved, and we wrote the procedures accordingly.

MR. POUNIAN: Your Honor, I'm going to have to move to strike that answer, based upon hearsay from Mr. Sonesen.

THE COURT: None of this is, in my opinion, admissible either for hearsay reasons or for reasons you've indicated.

MR. POUNIAN: I'm just saying for the purpose of presenting a record—

THE COURT: That's his problem.

MR. POUNIAN: I understand that, but I think Mr. Sonesen has to present the record, not Mr. Cozzi.

THE COURT: Even if they called Mr. Sonesen, it would still be hearsay.

MR. SHAUGHNESSY: Your Honor, the state of mind is the issue here.

THE COURT: It would still be hearsay.

MR. SHAUGHNESSY: Respectfully disagree, your Honor.

THE COURT: You can't develop a unilateral state of mind.

MR. SHAUGHNESSY: It is not a unilateral state of mind. That's the point.

Tr. 5617-19. The district court's rulings on "hearsay" and "unilateral state of mind" will be commented upon below.

Because, as in my dissent to the original majority opinion, I deem it necessary in the interest of uncontro-

vertible accuracy to quote at length from the record, I will not prolong this opinion by an extended counter-statement of the facts. Indeed, what is perhaps the most crucial fact has been established by stipulation:

> [Pan Am] insisted that a bomb contained in a suitcase would have been visible on x-ray. In fact, the parties stipulated to that fact.

Majority opinion at 31.

It is worth noting, however, how this stipulation came into being. After Pan Am was satisfied that it could use x-ray examination of luggage, it purchased for the Frankfurt airport the most expensive up-to-date x-ray machine on the market, the Astrophysics Linescan X-ray Screening System.

> Q Does your company make a larger machine than this?
>
> A This is the largest machine we make.
>
> Q Does your company make a more expensive machine than this?
>
> A No, sir.
>
> Q At the time it was sold, was there a newer or more advanced state of the art machine than this?
>
> A No, sir.

Tr. 5689 (testimony of Derek Kemp, an Astrophysics Company official).

Pan Am wanted the jury to see the machine and how it operated, and for this purpose it had the machine transported to the courthouse. For obvious reasons, plaintiffs' counsel did not want the jury to have the benefit of this first-hand observation, and he stipulated what an examination of the machine would have shown. Although Pan Am should not have been required to accept this stipulation in lieu of actual observation, *see*

United States v. Gantzer, 810 F.2d 349, 351 (2d Cir. 1987), the district court gave it no choice. At the district court's direction, the machine sat in the basement of the courthouse, alone and unobserved. The fact that plaintiffs' counsel objected to a jury inspection is evidence in and of itself that the district court erred in not permitting it.

Solely to demonstrate the danger of unquestioned reliance upon my colleagues' often-pejorative statement of facts, I address two excerpts from the majority opinion. Starting on line 24 of page 27, my colleagues say:

> The most wilful disregard of passenger safety, bordering on the outrageous, was in December 1988 when Pan Am received an FAA Security Bulletin advising that the United States Embassy in Helsinki had received a telephone warning that a Pan Am flight from Frankfurt to London and on to New York would be bombed. (Helsinki Warning).

In pertinent part, the Helsinki warning, with letters substituted for names, read as follows:

> On December 5, 1988 an unidentified individual telephoned a U.S. diplomatic facility in Europe and stated that sometime within the next two weeks there would be a bombing attempt against a Pan American aircraft flying from Frankfurt,FRG to the U.S. An individual identified as "X", who allegedly is in Finland and a second individual identified only as "Y" and is in Frankfurt, are involved. According to the caller, "Y" will provide the device to "X" who will in turn provide it to an unidentified Finnish woman in Helsinki. The woman, would unwittingly take the device to Frankfurt and eventually onto the U.S. bound flight.

Plaintiffs' Exhibit 33.

My colleagues' discussion of the Helsinki warning is in the nature of a half-truth that calls for exposition.

Pan Am's response to this warning, as described in the testimony of Wolfgang Schwab, a Pan Am supervisor at Frankfurt, was quite different than what my colleagues would have us believe:

QUESTION: Prior to the Lockerbie disaster, had it been brought to your attention that there was a warning received by the United States Embassy in Helsinki to the effect that a Pan Am Flight to the United States would be bombed?

ANSWER: Yes.

QUESTION: Tell us, please, when and how that was brought to your attention?

ANSWER: I am not able to give you the exact point in time but it was certainly before Lockerbie, when we were told that a female Finnish passenger would try to smuggle a bomb aboard.

QUESTION: Where were you when this came to your attention?

ANSWER: At the airport.

QUESTION: Where in the airport?

ANSWER: On the job.

QUESTION: Were you warned to pay particular attention to all female passengers or only Finnish female passengers?

ANSWER: Particularly to a female Finnish passenger.

QUESTION: Did you ever issue any instructions to look out for Finnish women or to pay particular attention to Finnish women?

ANSWER: Yes, I did.

QUESTION: When was that?

ANSWER: Before Lockerbie.

QUESTION: What instructions or suggestions did you issue?

ANSWER: Now, I told the screeners and the staff that they were to pay particular attention to female Finnish passengers or woman coming from that region up there and I told them that one person would try to smuggle a bomb aboard a plane.

QUESTION: Do you remember if you did it personally or if you asked someone else to do it?

ANSWER: I did it personally.

Tr. 1525-27.

Perhaps even more troubling to me is my colleagues' statement at page 28, line 17 of their opinion that the Helsinki warning was "deliberately" placed under a pile of papers on the desk of a Pan Am security officer. Needless to say, no page citation to the record accompanied the word "deliberately."

Because no changes made in a majority opinion can alter the immutable record of the trial court, I now direct my attention once again to what occurred below.

At one point near the end of the trial, Pan Am's counsel said to the court:

> Now, Judge, I would tell you, on a scale of 1 to 10, doing what I want in this courtroom, I have been about a minus 2, or maybe imaginary numbers would be a better way to describe as the level to which I have gone.

Tr. 5104.

I have read the record dispassionately, and I completely agree with this observation. Plaintiffs' attorneys were permitted to range far and wide with prejudicial, irrelevant testimony, while Pan Am's counsel was precluded time and again from presenting relative and probative

proof. Because I recognize that evidentiary rulings are largely discretionary, I will limit my discussion to what I deem the major reversible errors.

CONFLICT OF OPINION

At the outset, I want to state one clear and uncontrovertible fact: NO ONE KNOWS WHEN, WHERE OR HOW THE BOMB GOT ON THE PAN AM PLANE EXCEPT THE PERSON WHO PUT IT THERE.

The jury had to content itself with the expounding by plaintiffs' "experts" of what my colleagues correctly term "Plaintiffs' Causation Theory" (Majority opinion at 38). The accuracy of the supposition that a suitcase carrying the bomb was sent unaccompanied from Malta to Frankfurt, was transferred there to a Pan Am plane in which it was flown to London, where it was transferred to the plane in which it subsequently exploded, was a crucial issue in the case, because "Plaintiffs' Causation Theory" was based upon Pan Am's allegedly deficient baggage checks during the two transfers. If there were no transfers, there could not have been any wilfully deficient screenings. The district court permitted plaintiffs' experts to testify in support of the supposition but precluded any testimony by defendant's experts in opposition thereto. Having reviewed this proposed testimony of Pan Am's experts that the district court kept from the jury, I am convinced that had the jury been permitted to hear this evidence, there is a strong likelihood it would have rejected plaintiffs' contention that the bomb which exploded began its deadly journey in Malta.

The jurors who undoubtedly had suffered through the same experiences that many of us have, with missed planes and lost luggage during connecting airline flights, probably wondered how presumably clever and experienced terrorists reasonably could have expected an unaccompanied bag containing a bomb to travel from Malta to Frankfurt to London, through at least two sets of bag-

gage checks, to be smuggled finally aboard Pan Am Flight 103 and explode only after the plane had left London. The jurors' willingness to accept the plaintiffs' theory undoubtedly would have been influenced in large measure by what Pan Am's witnesses said.

Refutation of plaintiffs' supposition was permitted from Wilfred Borg, the general manager of ground operations for Air Malta, one of the few witnesses produced by defendant whose testimony was admitted:

> Q Let me show you what we have marked as Exhibits HF-1 through HF-15 in evidence. (Handing.)
>
> A Thank you.
>
> Q Looking at those exhibits, Mr. Borg, have you ever seen them before?
>
> A Yes, I did.
>
> Q Would you tell the ladies and gentlemen what those documents are, the whole package?
>
> A That is the flight file or the ship's papers for Flight KM-180, destined to Frankfurt in Germany on the 21st of December 1988.
>
> Q When did you first see this particular flight file?
>
> A I saw this flight file, the first time, in February '89.
>
> Q What were the circumstances under which you saw the flight file at that time?
>
> A Our office in Germany had received a request from the German police requesting us whether we had any passengers or baggage connecting to Pan American flights out of Frankfurt.
>
> They said they were investigating this, they wanted this information in view of the Lockerbie incident in December, '88.

Q And what did you do with respect to their request?

A The request was passed along to me by our office in Germany.

I requested the manager responsible to keep these records, to give me this relevant flight file. I went through it and gave the relevant replies to the German police.

Q What were those replies?

A We had no passengers connecting on the flights out of Frankfurt.

We had no baggage destined to go in flights out of Frankfurt.

And, we had no unaccompanied luggage on that flight.

Tr. 5991-92.

Q. Now, sir, based upon everything that you've read and all the investigation that you did, are you able to tell this jury whether or not there was an unaccompanied bag on Flight 180?

A. No, there was no such bag.

Q. Were there any bags destined for Pan Am, any Pan Am flights?

A. No, there are no bags.

Q. Any passengers destined for any Pan Am flights?

MR. BAUMEISTER: Objection, leading.

THE COURT: Sustained. [???]

Tr. 6041.

The following testimony of Dr. Ariel Merari of Tel Aviv University, an expert on terrorism and bombing, also would have shed unfavorable light on the Malta-

origin "theory." However, this testimony was kept from the jury.

Q. Do you think, sir, that it is conjectural how the bomb got on board?

A. Could you please rephrase the question.

Q. Do you know how the bomb got on board?

A. No, I don't.

Q. Do you think any, based upon the readings you have done in this record, a fair-minded, honest, so-called expert, with a reasonable degree of professional certainty, could opine how the bomb got on board?

. . .

A. Well, of what I have read, including the trial transcripts, I cannot see how anybody can say with any degree of certainty how the bomb got on board.

Q. Do you have any level of familiarity with what our government has been saying with respect to the indictments of two Libyans?

A. Yes, I do.

Q. And have you had, to the extent you can discuss this in this forum, a conversation with any representatives of security or secret services of any governments on that subject?

A. Yes.

Q. Has whatever knowledge that has come to you through those discussions in any way changed your view that an honest and reasonable chap cannot say to a reasonable degree of professional certainty how this bomb got on board?

A. No. I still feel that I don't know how the bomb got on board and I don't think that at this particular

stage, before more intelligence information comes in, which may be a long time after the incident, in some cases, I still feel that I don't know how the bomb got on board and I don't think anybody knows for sure or even in any degree of reasonable certainty how the bomb got on board at this time, except for the terrorists, of course.

Tr. 6259-60.

Q. Is it possible that a bomb was smuggled on board Pan Am 103 by an unwitting courier?

A. I think it is.

Q. Has that possibility been widely discussed secretly in the intelligence community?

A. Yes, it has.

Tr. 6258.

Even stronger refutation of the Malta theory was given by Peter Gurney, a Scotland Yard bomb expert, whose testimony also was kept from the jury:

Q. Let me ask you this: Do you have an opinion based upon your review of the data made available to you of the existence of the fire system that existed in that Neus Toshiba bomb B 453 radio cassette?

. . .

A. I do have an opinion.

Q. What is it?

A. I cannot see how such a device could have been used on a multi leg journey with one of the earlier legs being of longer duration than the flight on which the explosion took place.

Tr. 4582.

Q. If you were a bomb designer wanting to blow up Pan Am 103 over the Atlantic Ocean on [sic] off the

> coast of the United Kingdom would you use the Air Malta routing suggested in this case?
>
> A. I'm not a bomb designer. We often have to think like terrorist [sic] in order to combat them. I would think that that was very unlikely because air travel—there are many delays in air travel. Normally on the ground. So to work up the exact timing to get the thing to go off when you want it and not have it go off on the ground could be extremely difficult. This is used in a straightforward timer, sir.

Tr. 4588.

Finally, the defense made an unsuccessful offer of proof of testimony by Noel Koch, a security consultant for the United States Department of Defense. If Koch had been permitted to testify on the subject, he would have said that the Air Malta theory is "widely at variance with *modus operandi* of Middle Eastern Terrorist attacks and specifically attacks on U.S. airlines," and that the "Air-Malta theory involves far too many variables to jibe with usual *modus operandi.*" He also would have testified that the Pentagon relies on x-rays to scan baggage.

Admittedly, a district judge has wide discretion in determining whether to admit evidence. However, this discretion "may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue." *United States v. Sellers,* 566 F.2d 884, 886 (4th Cir. 1977). *See also Breidor v. Sears, Roebuck & Co.,* 722 F.2d 1134, 1141 (3d Cir. 1983). "Rule 403 requires even-handedness." *Goldberg v. National Life Ins. Co.,* 774 F.2d 559, 565 (2d Cir. 1985) (citing *Sellers* and *Breidor, supra*); *see also United States v. Onumonu,* 967 F.2d 782, 788-89 (2d Cir. 1992). The district judge's lack of even-handedness cannot be justified by his reliance on the indictment of two unapprehended, unquestioned and unapproachable Middle Eastern terrorists:

THE COURT: And I must view the evidence that we're talking about in that light, not in the light of a criminal case, because we're not in a criminal case.

MR. CODDINGTON: Exactly. And my submission to you is that you may not give any evidentiary weight to the fact of that indictment.

THE COURT: No. But I may give evidentiary weight, probable cause weight to the fact that a grand jury has returned the indictment. Not in a criminal case, but in the civil case, for purposes of, I may not so instruct the jury, but as a qualifier from my standpoint, I may give it that weight. In fact I must.

Tr. 6187.

Neither can the lack of even-handedness be justified by the district court's treatment as "facts" of evidence that my colleagues correctly characterize as theory and supposition.

THE COURT: The narrow question for this jury is given the facts in this case—and we know it's a Toshiba radio and as to which there has been a specific warning and in which the bomb was, and there was a specific warning about the bomb being placed on a flight and so forth. Those specific warnings and not as to some other possible bomb, but as to that, how you handled it and how you handled it in Frankfurt and how you handled it in London Heathrow, the general lax procedures which they have described, if they find all of that to be wilful misconduct which was the proximate cause of the crash, that's the issue for them to determine.

Tr. 5297-98. Needless to say, the "facts in this case" were to be determined by the jury, not the judge.

Because the house of cards to the effect that the bomb entered the stream of commerce in Malta was constructed

entirely of opinion testimony introduced by plaintiffs, simple justice required that defendant's experts be given an opportunity to demolish it. Obviously any testimony concerning how the bomb got on the plane had to be conjectural. However, the burden of proof on this issue was on the plaintiffs, not the defendant. Pan Am nevertheless offered expert testimony to challenge plaintiffs' contentions, which the district court refused to receive.

There can be no question but that conflicting expert testimony is admissible and that the jury, not the judge, decides how much weight to accord each expert's testimony. *United States v. Luschen,* 614 F.2d 1164, 1170 (8th Cir.), *cert. denied,* 446 U.S. 939 (1980). As one court put it, "court records are full of the conflicting opinions of doctors, engineers and accountants, to name just a few of the legions of expert witnesses." *United States v. Stifel,* 433 F.2d 431, 438 (6th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971); *see also In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145, 172 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988). "The mere fact that there may be conflicting testimony by experts is not a sufficient basis to exclude such evidence." *United States v. McBride,* 786 F.2d 45, 51 (2d Cir. 1986). Pan Am's proposed experts did not attack the credibility of plaintiffs' experts; they disagreed with the probative sufficiency of those experts' testimony. The weight to be accorded the testimony of each expert was a matter for the jury to decide. *United States v. Vitale,* 549 F.2d 71, 74 (8th Cir.), *cert. denied,* 431 U.S. 907 (1977).

If Pan Am's experts were correct in opining that no expert could testify with any degree of reasonable certainty how the bomb got on the plane, the district court's refusal to permit Pan Am's experts to so testify meant that the district court deprived Pan Am of all means of contesting the testimony of plaintiffs' experts on this important issue. The constitutional implications of such a

result are obvious. "[T]he admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988). Denial of this "ultimate safeguard" in the instant case was prejudicial reversible error.

WILFUL MISCONDUCT

A carrier covered by the Warsaw Convention cannot limit its liability to $75,000 if a plaintiff's damages were caused by the carrier's "wilful misconduct." Wilfulness as thus used involves the issue of intent, not an intent to violate an FAA regulation, but the intent to perform an act with knowledge that it probably will result in injury and with disregard of that probable consequence. *See Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *see also Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993). The violation vel non of an FAA regulation, even if intentional, is not determinative of the issue of wilful misconduct under the Convention. *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 537 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). The issue of wilfulness or wrongful intent is an issue of fact to be resolved by the jury. *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1489 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991); *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 124 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *Hill v. United Airlines*, 550 F. Supp. 1048, 1056 (D. Kan. 1982); *In re Pago Pago Aircrash of January 30, 1974*, 419 F. Supp. 1158, 1160 (C.D. Cal. 1976). Because the issue of intent, or state of mind, is crucial in any determination of wilful misconduct, the following generalizations concerning proof of intent will be helpful in the discussion that follows.

It is well established that a person's state of mind is a fact question to be proved the same as any other fact. *Chicago & N.W. Ry. Co. v. McKenna,* 74 F.2d 155, 158 (8th Cir. 1934). The state of a person's mind is as much a fact as the state of the person's digestion. *Rogers v. Virginia-Carolina Chemical Co.,* 149 F. 1 (3d Cir. 1906) (citing *Edgington v. Fitzmaurice,* 29 L.R. Ch. Div. 459). Accordingly, a defendant generally is permitted to testify concerning his motive, belief and intent. *McKenna, supra,* 74 F.2d at 158. "Where a defendant's intent is in issue he should be permitted to testify as to his motive and actual intent or state of mind." *United States v. Hayes,* 477 F.2d 868, 873 (10th Cir. 1973). Such evidence cannot be excluded on the ground that it is self-serving. *United States v. Matot,* 146 F.2d 197, 198 (2d Cir. 1944).

In *Crawford v. United States,* 212 U.S. 183, 204-05 (1909), which involved an alleged conspiracy to defraud the United States, the charge was made that the defendant took some correspondence from a corporate file for the purpose of destroying evidence against him. Defendant's attempt to explain that he took the letter for a lawful purpose was rejected. The Supreme Court held that "[n]o material and proper evidence upon that issue should have been excluded, and the error committed was not, in our opinion, clearly shown to have been harmless." In *United States v. Harris,* 942 F.2d 1125 (7th Cir. 1991), which involved the question whether money paid to the defendant was intended as a gift, the court held that the trial court erred in rejecting letters that accompanied the payment on the ground they were hearsay. *Id.* at 1131. The court said that "[the defendant's] belief about [the letter writer's] intent decides the issue of willfulness, which is an element of the offense." *Id. See also United States v. Detrich,* 865 F.2d 17, 21 (2d Cir. 1988); *United States v. Kohan,* 806 F.2d 18, 21-22 (2d Cir. 1986); *United States v. Kyle,* 257 F.2d 559, 563 (2d Cir. 1958), *cert. denied,* 358 U.S. 927 (1959); Fed. R. Evid. 803(3). In *United States v. Rubin,* 591 F.2d 278 (5th Cir.), *cert.*

denied, 444 U.S. 864 (1979), the defendant was convicted of embezzling union funds by taking unauthorized salary increases. One of his defenses was lack of criminal intent. Because the facts of that case are strikingly similar to the facts of the instant case, I quote in full that portion of the Fifth Circuit's opinion which found the rejection of the proffered evidence to be reversible error:

> One of Rubin's defenses in this case was lack of criminal intent. He claimed that because he interpreted the unions' constitutions as allowing the salary increases, he was unaware that the increases were actually unauthorized. The constitutions, however, appear clearly to mandate a different procedure for obtaining salary increases from the procedure followed by Rubin. To explain why he nonetheless believed the salary increases were authorized, Rubin testified that his understanding was that the constitutions were not to be interpreted literally. Rubin wanted to explain further that both present and past presidents of the unions, those individuals given the duty of interpreting the constitutions, had told him that the constitutions were flexible, living documents that could be interpreted to fit the needs of a particular local. The trial judge excluded this testimony as hearsay.
>
> The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" Fed. R. Evid. 801 (emphasis added). As Rubin explained at trial, he did not offer the statements to prove the truth of the matter asserted, but instead to prove that he had heard them and to establish their effect on his mind. *See Dutton v. Evans,* 400 U.S. 74, 88, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Thus, Rubin's proffered testimony was not hearsay, and

> because it was relevant to his state of mind, it should have been admitted. *See* Fed. R. Evid. 401 & 402.

Id. at 283.

A court has no right to reject testimony dealing with a person's state of mind because it deems the testimony incredible or lacking in persuasive force. *See Western Industries, Inc. v. Newcor Canada Ltd.,* 739 F.2d 1198, 1202 (7th Cir. 1984); *Ballou v. Henri Studios, Inc.,* 656 F.2d 1147, 1154 (5th Cir. 1981). Credibility and believability are for the jury, not the judge. *United States v. Thompson,* 615 F.2d 329, 332 (5th Cir. 1980); *see also Bowden v. McKenna,* 600 F.2d 282, 284-85 (1st Cir.), *cert. d*enied, 444 U.S. 899 (1979). "In the first place, credibility is a question for the jury; to permit the judge to exclude evidence on the ground that he thinks it incredible would be a remarkable innovation and may even be a violation of the right of trial by jury." Wright & Graham, *Federal Practice and Procedure: Evidence* § 5214 at 265-66.

The concern expressed in the above authorities was reiterated by the Supreme Court in the case of *Cheek v. United States,* 498 U.S. 192 (1991), where it said at 203:

> Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it. It would of course be proper to exclude evidence having no relevance or probative value with respect to willfulness; but it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.

The pertinence of the above legal generalizations in the instant case is readily apparent. It cannot be gain-

said, for example, that resolution of the issue of wilfulness involves consideration by the jury of the mental processes of Pan Am officials. As stated above, the state of mind of these officials was a fact question to be proved the same as any other fact, and the district judge had no right to reject testimony dealing with this fact because he deemed it incredible or unpersuasive. As the Supreme Court said in *Crawford v. United States, supra,* no material and proper evidence upon the issue of the defendant's intent should have been excluded, and the error committed by such exclusion was not harmless. 212 U.S. at 205. We echoed this language in *Vinieris v. Byzantine Maritime Corp.,* 731 F.2d 1061 (2d Cir. 1984), where we held that, because the issue of wilfulness was a crucial issue in the case, the trial court should have followed a liberal policy in admitting evidence directed toward that issue and that "[n]o evidence which bore even remotely on this issue should have been kept from the jury unless it interjected tangential and confusing elements which clearly outweighed its relevancy." *Id.* at 1064. In *United States v. Brandt,* 196 F.2d 653 (2d Cir. 1952), we reversed a mail fraud conviction, in language almost identical to that used in *Vinieris,* because the trial court rejected evidence aimed at establishing the defendant's intentions. *Id.* at 657. *Cf. Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 294-98 (1892). *See also* 29 Am. Jur.2d *Evidence* § 361, where the applicable rule is stated in language almost identical with that used in *Vinieris*:

> Any evidence which has a material bearing upon the intent with which a person acted and which fairly tends to a disclosure thereof, or which is explanatory of the intent or purpose with which an act was done, or is to be done, is admissible.

The record is clear that both the district court and plaintiffs' counsel had ample notice of Pan Am's intention to offer evidence of Sonesen's conversation with Salazar

concerning the propriety of using x-ray screening. This intent was stated unambiguously in paragraphs 63-65 of the pretrial order:

> 63. In late 1986 or early 1987, Daniel Sonesen, System Director-Corporate Security and co-chairman of the Security Task Force, at the request of the other Security Task Force members, conferred with the FAA concerning the use of X-ray security screening of interline baggage at Pan Am European stations and whether the X-ray security screening of such baggage met the requirements of Section XV.C.1.(a) of the ACSSP.
>
> 64. At that time, the FAA permitted X-ray security screening of many items, and the FAA advised Mr. Sonesen that X-ray security screening of interline baggage met the requirements of Section XV.C.1.(a) of the ACSSP.
>
> 65. Mr. Sonesen reported back to the Security Task Force that the FAA had said that X-ray screening of interline baggage met the requirements of Section XV.C.1.(a) of the ACSSP.

Moreover, both the court and plaintiffs' counsel had copies of Sonesen's pretrial depositions in which he testified about his conversation with Salazar. Plaintiffs' counsel also had in his possession a copy of an E-mail message from Sonesen to Pan Am security officers that read as follows:

> PER MESSAGE OF 10 MAR-88 ANSWER: THE DIR. FAA R SALIZAR HAS GRANTED X RAY AS AND [sic] ALTERNATE TO SEARCHING PASS. BAGGAGE.

Knowing what Sonesen's testimony would be, plaintiffs' counsel decided to meet the evidence head on by placing the E-mail message in evidence as part of his affirmative case. He then offered the following testimony from Salazar:

Question: This document is something more than that, doesn't it, sir? It says that you granted x-ray as an alternative, doesn't it?

Answer: Yes, that is what the document says.

Question: You just said to me you never granted that to Mr. Sonesen?

Answer: That's correct, I did not.

Question: You had never even spoken to Mr. Sonesen, did you?

Answer: About this issue, I have no specific recollection of speaking to Mr. Sonesen about this issue.

Question: Therefore, sir, if you didn't grant permission to Mr. Sonesen, and he said in this document you did, isn't that a lie?

Answer: It is an improper interpretation.

Question: It is an improper interpretation. I am not talking interpretation now of the procedures, I am talking about the statement: R. Salazar granted.

Is that statement accurate?

Answer: No, it is false.

Question: So that statement, as it goes, R. Salazar has granted, is a lie.

A VOICE: Objection.

Answer: Again, it is only what—I can say it is here. It is a misrepresentation. It is not an accurate depiction of the requirements for air carriers operating out of those stations.

Question: Can we agree that when Mr. Sonesen said that you had granted, in this phrase, that that was a falsehood?

Answer: That was a falsehood.

Tr. 1279-80.

On the basis of Salazar's testimony, the district judge made a colossal blunder by a *sua sponte* ruling that was so contrary to established legal precedent and simple justice that it smacked of a due process and Seventh Amendment violation—he declared that he would receive no testimony from Sonesen or any other Pan Am employee in support of Sonesen's assertion of what Salazar had told him. Sonesen, whose proposed testimony was an important part of Pan Am's defense, was branded a liar, and the district judge precluded Pan Am from attempting to prove that he was not. So far as the jury knew, a substantial part of Pan Am's defense was built upon a lie, or as plaintiffs' counsel described it in summation, "a concocted piece of baloney." Tr. at 6395.

The district court correctly charged the jury that "the violation of FAA regulations and safety standards . . . would not necessarily constitute willful misconduct." Tr. 6557. However, because of the district court's erroneous exclusions of evidence, this portion of its charge became meaningless. The district judge treated this case as if Pan Am were being prosecuted for criminally violating a federal statute and, relying on his erroneous interpretation of criminal law, precluded every attempt by Pan Am to demonstrate that it did not know or believe that the probable result of its conduct would be injury to the plaintiffs.

THE COURT: This whole thing starts at page 65 and it goes right on through to page 78 and it leads up to the very question we have been discussing now for days, namely, the FAA, the alleged FAA verbal authorization.

I don't see what this has got to do with the price of beans, what his understanding of the ACSSP procedures are. He's not in court here. The regulations speak for themselves.

I don't see what basis this comes in under anyplace.

MR. SHAUGHNESSY: Your Honor, this is a willful misconduct case.

THE COURT: I know it's a willful misconduct case, but willful misconduct is not excused by Sonesen's version of an oral permission which is not admissible in the FAA. It is not admissible. And that's all this is.

Tr. 3958-59.

THE COURT: Whether it be offered for the purpose of authority or willfulness or anything else, it is out.

Tr. 3351.

THE COURT: It just doesn't make any sense to me that anybody in his right mind would rely—would, in fact did rely on any such permission. It just didn't exist.

Tr. 4789.

MR. SHAUGHNESSY: So I take it that all of the conversations among these people are out?

THE COURT: Obviously they're not objecting to it, but I'm going to sustain those three questions that he's objected to and I'm going to—you might as well know now that I'm going to sustain the questions and answer on page 78.

MR. SHAUGHNESSY: I understand, your Honor.

THE COURT: And anything else that they object to in between I'm going to sustain because I think it's irrelevant.

Tr. 3962.

The district judge even precluded Pan Am from showing that FAA officials inspected Pan Am's operations both before and after the bombing and made no complaints of irregularities. The district judge's ruling on this issue is illustrative of his mind-set.

THE COURT: I'm satisfied, Mr. Shaughnessy, this is another back-door method of getting Mr. Sonesen's unilateral interpretation of his authority to bury the FAA regulations before this jury. I don't like you doing it.

I think the next time you attempt to do it you should alert the Court that this is what you're attempting to do. I have ruled upon it.

Had you gotten this before the jury before alerting me and one had been asleep, I probably would have had to declare a mistrial. We're six weeks into this trial.

The law has been stated by me to be that based upon two Second Circuit decisions, both of which went to the Supreme Court and certiorari was denied, you have promised me that you were going to show me the law was otherwise. You haven't.

You may not do this.

I don't know how I can make myself clearer.

MR. SHAUGHNESSY: All I wanted was to ask the witness—

THE COURT: You attempted to get this FAA report in before this jury with, knowing that this man was operating under this assumption, that what

they were doing was correct and was in direct violation of the FAA regulations, and he was doing it on the basis of this verbal authorization of Mr. Sonesen who said he had reached him.

According to FAA officials, testified he didn't have, and the regulations themselves say he couldn't have, and you can't do it.

You do it again and I'm going to have to take appropriate action.

Tr. 4365-66.

FAA's policy in looking for violations of its regulations is well known:

> . . . [W]hen we feel there is a serious violation or serious numbers of violations that requires significant deterrent effect, we have been forced to go out and scrape up every possible violation of the Regulations that is appropriate in order to compute these large penalties.
>
> Testimony of Clark Onstad, Chief Counsel, FAA before the Subcommittee on Aviation of the Committee on Public Works and Transportation, House of Representatives, 96th Cong., 2d Sess. July 1, 1980, Record of Hearing on H.R. 7488 at 38.

FAA v. Landy, 705 F.2d 624, 638 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983) (Van Graafeiland, J., concurring in part and dissenting in part).

A threat of contempt for attempting to introduce evidence that FAA officials who, after personally inspecting Pan Am's operations found no fault with them, is pretty strong medicine. However, it illustrates once again that the district judge was fully aware of what Sonesen's testimony would have been. For further evidence of this knowledge, see the following excerpts from the record:

THE COURT:

As I understood, your position is somebody in the FAA, I don't know who, told Sonesen or somebody in Pan Am verbally once they had the x-ray machine they didn't have to physically search a couple of bags.

MR. SHAUGHNESSY: That's correct.

THE COURT: That is your position.

MR. SHAUGHNESSY: I understand.

Tr. 1138-39.

THE COURT:

Mr. Sonesen's testimony was, as I recall it, and it's right here before us, Sonesen's testimony was that I got this verbal permission from Salazar, we discussed it up and down the hierarchy which would include these discussions here right up to what's his name.

Tr. 3960.

THE COURT: Salazar had the authority, but there has been nothing produced in writing and Sonesen said he got it orally and he acted on it orally and he told all of these people that he had the authority from the FAA and it's irrelevant what he told people in the Pan American organization on this subject, because he didn't have the authority.

Tr. 3961.

I regret that my colleagues, in their zeal to support the outcome of an obviously unfair trial, advance the fallacious argument that a formal proffer of Sonesen's testimony was essential. *See Massachusetts Mutual Life Ins. Co. v. Brei*, 311 F.2d 463, 465 n.1 (2d Cir. 1962); *Charter v. Chleborad*, 551 F.2d 246, 248-49 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977).

My colleagues go equally astray in arguing that Pan Am waived its objection to the district judge's erroneous

exclusion of evidence by refusing to accept the following offer of the district court made after two months of trial:

> On the so-called verbal authorization, I didn't think they would be able to come up with any cases. Of course, they haven't come up with any cases, which changes the law in this circuit.
>
> If they want me to give the jury an instruction to disregard the testimony that came in at the outset of the case before I understood what the issue was, I will be glad to give that instruction.
>
> But I rather suspect they don't want me to highlight it at this point. But if they want me to, I will be glad to tell them that they are to disregard any such conversations between Salizar [sic] and they are to draw no inference one way or the other from it because it is irrelevant to this case, and Sorenson [sic]. But it is not admissible.

Tr. 4787-88.

This offer was an obvious, but inevitably unsuccessful, attempt by the district court to mitigate its earlier blunder. The district court knew that plaintiffs' expert witness, Rodney Wallis, had the pertinent portions of Salazar's testimony recorded on acetate, which Wallis displayed to the jury during what Pan Am's counsel accurately described as Wallis's pre-summation summation. In the course of this lengthy summation, a questionable practice at best, Wallis made the following comments concerning Salazar's testimony:

> And the reason I selected these was because I talked of violation, and this was showing me what the violation was.

Tr. 2945.

> And I picked that out because, as I say, to me, it pointed me in a direction. It indicated what was the requirement.

Tr. 2947.

> So. This was saying to me what the rules were, what the requirement was.

Tr. 2948.

> So, that was the message that I was getting from the Salazar testimony, . . .

Tr. 2949.

The above-quoted testimony, which constituted a "positive assessment of the trustworthiness and accuracy" of Salazar's testimony, clearly should not have been admitted. *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988), and see modified opinion in *Scop*, 856 F.2d 5 (2d Cir. 1988), emphasizing inadmissibility. However, it was admitted, and neither the district court nor plaintiffs' counsel suggested that the jury might be instructed to disregard it. This was understandable, of course, because of the important role that Salazar's testimony played in Wallis's opinion.

Moreover, the suggested instruction that the jury disregard "any such conversations between Salazar and they are to draw no inference one way or the other from it because it is irrelevant to this case," followed by the statement that Sonesen's testimony remains inadmissible, simply demonstrates the district court's misunderstanding of the law. An instruction to the jury that the conversation between Sonesen and Salazar was irrelevant and should be disregarded would deprive Pan Am of one of its major defenses, i.e., its lack of wilfulness based on that very conversation. The undeniable fact is that the subjective proof of Sonesen's understanding was highly relevant, and Pan Am's counsel would have been foolish to stipulate otherwise. Pan Am's counsel's refusal to leap at the court's suggestion demonstrates that he had a better understanding of the applicable law than the district court or my colleagues have demonstrated.

Time and again, Pan Am's counsel explained his position to the district court, all to no avail:

The meetings that are referred to there, testimony of Mr. Sonesen, I don't know whether Mr. Baumeister is going to read any of his deposition, was that there was a discussion at that meeting and that at that meeting Mr. Salazar said specifically that in connection with ICAO 514 and London Heathrow Airport in particular, that x-ray was a suitable alternative to the bag match.

Now this is a willful misconduct case, your Honor, in which Mr. Sonesen, the plaintiffs are claiming they willfully disregarded this provision, 15C1(a). If the jury believes Mr. Salazar that in fact the discussion was limited to ICAO 514, they still could believe that Mr. Sonesen, based on the meeting and what was discussed, could have believed, legitimately believed, that x-ray was a suitable alternative and that Mr. Salazar had said that.

This is a willful case, your Honor.

Tr. 1294-95.

The district judge never budged from his misunderstanding of the law:

THE COURT:

The proposition before us is that Sonesen says—Sonesen not being Pan Am corporation, about whom we are talking, but only an employee of Pan Am. Sonesen says he got verbal permission from Salazar. The cases are quite clear, that that is inadmissible under the issue of lawfulness or otherwise, and I have never seen anything at the moment, recently, that casts any doubt on it.

Tr. 3376.

THE COURT: Ever heard the expression, an individual may not bind the government?

MR. CODDINGTON: Ever heard the expression that an individual may not bind the government? Yes, I have.

THE COURT: The government enacted a regulation or promulgated a regulation, I may not take off my robe, I may not work until executive capacity authorizes to make that. United States against Sorenson [sic] regulates, while on this subject, said: Whoever had the authorization from the DIA and C.I.A. to smuggle guns to Russia, and so forth and so on, and the 2d. Circuit upheld, may not do that verbally. That's the law.

This theory of yours, if you have verbal authorization from somebody to violate a regulation, I will have to charge the jury that an individual may not do that.

MR. CODDINGTON: Well, certainly I'm happy to brief that.

THE COURT: Brief it all you want, because I sweated blood over this issue, because this was really quite serious. This was the business of taking armaments from this country and swapping it over from Russia, all on the okay of D.I.A. and C.I.A., And I wouldn't let them put that defense before the jury, and the 2d. Circuit said I was right. I went through a tremendous amount of research and wrote an opinion on this, and it was published, *United States -vs-Schwartz*. You may not as an individual authorize somebody to do something against the regulation, whether you are high-ranking. I don't think the President may do it. I didn't have to decide.

Tr. 3219-20.

THE COURT: In any event, nobody approved this in writing.

So the whole defense is a non-entity.

I know you don't want to get rid of it from your mind, but there it is. If you want to stop the trial and mandamus me to the Second Circuit and have your ears pinned back, fine.

But that's it, that's the ruling, you've got to live with it. You've got to stop trying to sneak it in through the back door or I'm going to have to take appropriate action.

Tr. 3965.

THE COURT:

You might have some validity to it if—if there was any kind of an acknowledgment from Salazar that he—that he had any such conversation, but he emphatically denies it.

Everybody says it is not within anybody's power to give it or—and the regulation itself says you've got to have any modification in writing.

It just doesn't make any sense to me that anybody in his right mind would rely—would, in fact did rely on any such permission. It just didn't exist.

Tr. 4789.

The cases of *United States v. Duggan,* 743 F.2d 59 (2d Cir. 1984), *United States v. Schwartz,* 924 F.2d 410 (2d Cir. 1991) and *United States v. Berg,* 658 F. Supp. 253 (E.D.N.Y. 1987) (affirmed in part by *Schwartz, supra*), so heavily relied upon by the district court and my colleagues, do not support their interpretation of the applicable law. Those cases involved alleged violations of criminal statutes, not the tort issue of whether the defendant wilfully placed the decedents in a position of danger. Moreover, as we stated in *Duggan,* 743 F.2d at 83, "[t]here is an exception [to the mistake of law rule] for legitimate reliance on an official interpretation of law." *See, e.g., United States v. Laub,* 385 U.S. 475, 487 (1967) ("Ordinarily, citizens may not be punished for actions

undertaken in good faith reliance upon authoritative assurance that punishment will not attach."); *see also United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 675 (1973). Finding in *Duggan* that the defendants had not received an "official interpretation of the law" we held that the defense of mistake of law was not available to them. *See* 743 F.2d at 83-84. We returned to that theme in *United States v. Schwartz, supra,* where we said:

> Since Schwartz had no authority to authorize the crimes charged against them, Berg and Lisbona may not claim reliance on whatever account he might have given them.

Id. at 422. The authority of Raymond Salazar, Director of FAA Office of Civil Aviation Security, to interpret regulations which he and his staff had promulgated cannot be disputed.

My colleagues, I suggest, also err in their interpretation of *Cheek, supra,* to the effect that the holding therein applies only to tax cases. *Cheek* stands for the general proposition that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' " 498 U.S. at 201 (citations omitted). It also holds that a good-faith belief that one is not violating the law, if it is to negate wilfulness, need not be objectively reasonable.

> Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it.

Id. at 203.

Wilfulness, in short, is a question of fact for the jury. *See Floyd v. Eastern Airlines, Inc., supra,* 872 F.2d at 1489; *Pekelis v. Transcontinental & Western Air, Inc., supra,* 187 F.2d at 124; *see also United States v. Ingredi-*

ent Technology Corp., 698 F.2d 88, 97 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983). A trial judge cannot take the question from the jury and answer it himself by applying his own objective standard of wilfulness. This is the clear holding of *Cheek*. *See also Ratzlaf v. United States*, 114 S. Ct. 655 (1994), where the Supreme Court interpreted the language of 31 U.S.C. § 5322, which forbids a person from wilfully violating the antistructuring provisions of sections 5322(a) and 5324. Justice Ginsburg, writing for a five-judge majority, said: "To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 657; *see also id.* at 633 n. 19.

We would be blinking reality if we did not hold that the district judge's erroneous rulings were prejudicial. Indeed, as disclosed by the following excerpt from the argument on appeal, plaintiffs' counsel admitted as much:

> JUDGE VAN GRAAFEILAND: Let me ask you this, Mr. Kreindler: If I read the record, I listen to your argument and I read the record, and I decide that Judge Platt said I'm not going to hear from Mr. Sonesen no matter what, would you concede that that is very prejudicial error in this case?
>
> MR. KREINDLER: Under those circumstances, yes. But that's not what happened. That's—
>
> JUDGE VAN GRAAFEILAND: I'm not asking you that. I'm asking you if I read this record and I decide that that is what happened—leave this offer of proof business out—if I decide that Judge Platt just simply said, I'm not going to hear Mr. Sonesen, that would be prejudicial error; wouldn't it, in this case?
>
> MR. KREINDLER: Your Honor, even—
>
> JUDGE VAN GRAAFEILAND: Counsel, wouldn't it be prejudicial error?

MR. KREINDLER: Of course, if the judge were hearing—

JUDGE VAN GRAAFEILAND: Of course, it would. Then we have got the issue: did he refuse to hear him, or didn't he?

MR. KREINDLER: No.

JUDGE VAN GRAAFEILAND: All right, that's the issue. I'll read the record very carefully, Mr. Kreindler.

Moreover, the district judge himself recognized the crucial importance of Sonesen's testimony when he said, "You're in trouble if this is your defense." Tr. at 3355-56.

No one, I suggest, can dispute the proposition that even-handedness is the *sine qua non* of a fair trial. A trial is not a "game of blindman's buff." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). It is a "search for the truth." 8 Wright and Miller, *Federal Practice and Procedure* § 2001 at 14. That search will succeed only if the trial court recognizes the right of each party to present its evidence and to rebut that of its opponent, a right that "is a fundamental element of due process of law." *See Washington v. Texas,* 388 U.S. 14, 19 (1967). It is a rule as old as the proverbial hills that when a party opens a subject in its case in chief, its opponent is entitled to offer evidence on the same subject, i.e., to explain, repel, counteract or disprove the evidence that the party introduced. *See, e.g., United States v. Touloumis,* 771 F.2d 235, 241 (7th Cir. 1985); *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir.), *cert. denied,* 423 U.S. 893 (1975); *United States v. Mallis,* 467 F.2d 567, 569 (3d Cir. 1972); *Luttrell v. United States,* 320 F.2d 462, 464 (5th Cir. 1963); 1 *Wigmore on Evidence* § 15 at 740.

In view of the definitive holding of the Supreme Court in *Cheek, supra,* that a good-faith misunderstanding of

the law or a good-faith belief that one is not violating the law need not be objectively reasonable in order to negate wilfulness, the district court's ruling for the "425th time" that Salazar's verbal permission was "not in this case," Tr. 3959, was clearly and prejudicially erroneous.

Even my colleagues concede that the district court erred in excluding evidence of British Airway regulations which, in the face of bombings by Irish terrorist organizations, permitted Pan Am and other carriers to x-ray unaccompanied baggage at Heathrow Airport. I regret that in my colleagues' apparent eagerness to affirm, they hold this error to be harmless. It was not harmless. It went squarely to a crucial issue in the case, i.e., whether Pan Am knew that its use of x-ray screening probably would result in injury.

Evidence that, shortly after the Lockerbie accident the FAA amended its regulations so as to clarify the permissible use of x-ray screening, also went squarely to the issue of whether Pan Am should have anticipated danger in its pre-amendment use of x-rays. The district court's refusal to permit the jury to receive this evidence exacerbated all of the court's similar rulings that pervaded the trial. In short, it was another indication that the district court misunderstood the law. The issue was not whether Pan Am violated the regulation; it was whether Pam Am used x-ray screening with knowledge that its use would probably result in injury or in reckless disregard of the probable consequences.

DAMAGES

In my dissent to the original majority opinion, I expressed concern over my colleagues' handling of the question of damages. However, since my colleagues now agree that the cases must be returned to the district court for retrial on the issue of damages for loss of society and parental care, I will not repeat what I have already said.

CONCLUSION

Whenever, as here, an appellate court affirms a judgment based on opinion and conjecture, it faces the nagging possibility that someday the truth will out and prove the conjecture wrong. If the erroneous judgment was the culmination of a fair trial, the appellate court, although unhappy with its role in the error, need have no feeling of guilt or remorse. This would not be true if the errors below either were ignored or termed "harmless." Needless to say, I do not want someday to find myself in the latter unhappy situation.

If all of the irrelevant and prejudicial evidence dealing with such matters as television commercials and the private lives of Pan Am employees, together with the colloquies of court and counsel arising out of the district court's "425" erroneous rulings, were eliminated from this case, it could be retried in several weeks. My colleagues now agree that the case must be retried in part on the issue of damages. Particularly in view of the fact that the outcome in over two hundred claims hinges upon the judgment in the instant case, justice demands that the matter be remanded in its entirety so that it can be tried fairly.

Except for the remand to the district court on the damages issue, I dissent.

APPENDIX B

[Filed Sep. 12, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of September, one thousand nine hundred and ninety four

---

Docket Nos. 92-9251, 92-9253, 92-9255

IN RE: AIR DISASTER AT LOCKERBIE SCOTLAND
ON DECEMBER 21, 1988

JUDITH A. PAGNUCCO

v.

PAN AMERICAN WORLD AIRWAYS, INC.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Pan Am World Airways, Inc., and Alert Management Systems,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, except to the extent indicated in the revised majority opinion of September 12, 1994, and

It is further noted that the suggestion for rehearing in banc having been transmitted to the judges of the Court in regular active service, and to any other judge that heard the appeal, and a poll of said judges having been taken, a majority of the Court has voted not to reconsider the decision in banc.

FOR THE COURT

/s/ George Lange III
Clerk

APPENDIX C

[Filed Oct. 28, 1994]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of October one thousand nine hundred and ninety-four.

Dkt. No: 92-9251

JUDITH A. PAGNUCCO, Individually and as Executrix of the Estate of ROBERT I. PAGNUCCO, deceased; MOLENA A. PORTER, Individually and as Administratrix of the Estate of WALTER L. PORTER, deceased; and DONA BARDELLI BAINBRIDGE, Individually and as Administratrix of the Estate of HARRY M. BAINBRIDGE,
Plaintiffs-Appellees,

—v—

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Defendants-Appellants.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is *DENIED*.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III
Clerk

by: /s/ George Lange III
Chief Deputy Clerk

APPENDIX D

[Filed Oct. 28, 1994]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

GEORGE LANGE III
Clerk

CORRECTED

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of October, one thousand nine hundred and ninety-four.

Dkt No: 92-9251

JUDITH A. PAGNUCCO, Individually and as Executrix of the Estate of ROBERT I. PAGNUCCO, deceased; MOLENA A. PORTER, Individually and as Administratrix of the Estate of WALTER L. PORTER, deceased; and DONA BARDELLI BAINBRIDGE, Individually and as Administratrix of the Estate of HARRY M. BAINBRIDGE,

Plaintiffs-Appellees,

-v-

PAN AMERICAN WORLD AIRWAYS, INC., and ALERT MANAGEMENT SYSTEMS, INC.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the Defendants-Appellants,

Upon consideration by the panel that decided the appeal, and Judge Van Graafeiland having refrained from voting on said petition, it is ordered that this petition for rehearing is denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service, and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

/s/ George Lange III
GEORGE LANGE III
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Courthouse
40 Foley Square—Room 1702
New York, N.Y. 10007

George Lange III
Clerk

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Re: 92-9251

Dear Counsel:

At the request of Judge Van Graafeiland, we are sending you herewith copies of the memoranda submitted by him in connection with the two petitions for rehearing filed in this matter.

Very truly yours,

/s/ George Lange III
GEORGE LANGE III
Clerk

GLIII/yb
Enclosure: Two memoranda

cc: Panel
Hon. Jon O. Newman, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 92-9251

In Re: Air Disaster at Lockerbie Scotland
(Vote on petition for rehearing)

The original majority opinion in this matter was filed on January 31, 1994. My dissent to this opinion was filed on February 18, 1994. Appellants petitioned for rehearing on February 28, 1994, and I suggested in banc review on April 15, 1994. While the in banc application was pending, the majority prepared an amended opinion and I, of necessity, prepared an amended dissent.

Appellants' petition for rehearing now brings to the fore the "serious misgivings" that I expressed concerning the procedure adopted in handling my request for in banc review at the time the majority proposed to file its amended opinion. It was my belief that once the majority filed an amended opinion, appellants' petition for rehearing of the original opinion and my request for in banc review of the denial of that petition became moot and that appellants should be permitted to file a new petition for rehearing addressed to the amended opinion. Instead, it was decided that neither the amended majority opinion nor the amended dissenting opinion would be filed until the vote on the in banc was completed, and that the two opinions and the in banc order then would be filed simultaneously. This is what was done.

I disclose no confidential matters when I state that my colleagues' vote, although theoretically addressed to the original opinion, also encompassed the opinion that supplanted it. Since the vote was in favor of denying in banc

review, a vote at this time in favor of rehearing would be meaningless. Accordingly, I refrain from voting. Appellants should have been given the opportunity to make this motion before the in banc court considered the amended opinion. *See* Fed. R. App. P. 40; Second Circuit Rule 40.

/s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

September 30, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 92-9251

In Re: Air Disaster at Lockerbie Scotland
(Second Suggestion for Rehearing In Banc)

As I already have pointed out, defendants-appellants were deprived of the opportunity to seek a rehearing addressed to the panel majority's amended opinion because, unknown to defendants-appellants, my request for an in banc hearing addressed to the majority's original opinion was enlarged to cover the amended opinion as well. Accordingly, I will not engage in the futile gesture of seeking an in banc hearing of the denial of defendants-appellants' second rehearing petition. My failure to seek such in bank should not however be taken as a vote of approval for the procedure which deprived defendants-appellants of a meaningful application for rehearing.

/s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

October 17, 1994

Copies sent to all judges

APPENDIX F

[Filed Nov. 9, 1994]

92-9251, -9253, -9255

Pagnucco

v.

Pan American

Notice of Motion for Consent Motion to Stay Issuance of the Mandate

* * * *

[Portions of Form Omitted]

Brief statement of relief requested: Stay mandate, pursuant to Fed. R. App. P. 41(a), pending Appellant's application for certiorari, if Appellant's petition is filed on or before November 25, 1994.

ORDER

IT IS HEREBY ORDERED THAT the motion be and it hereby is granted.

/s/ Ellsworth A. Van Graafeiland
by FXA

/s/ Richard J. Cardamone
by FXA

/s/ Frank X. Altimari
Circuit Judges

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1280, 1281, 1282—August Term 1992

(Argued May 19, 1993 Decided January 31, 1994)

Docket Nos. 92-9251, 92-9253, 92-9255

IN RE: AIR DISASTER AT LOCKERBIE SCOTLAND
ON DECEMBER 21, 1988

JUDITH A. PAGNUCCO, Individually and as Executrix of the Estate of Robert I. Pagnucco, deceased; MOLENA A. PORTER, Individually and as Administratrix of the Estate of Walter L. Porter, deceased and DONA BARDELLI BAINBRIDGE, Individually and as Administratrix of the Estate of Harry M. Bainbridge,
Plaintiffs-Appellees,

v.

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.
Defendants-Appellants.

Before:

VAN GRAAFEILAND, CARDAMONE and ALTIMARI,
Circuit Judges

CARDAMONE, *Circuit Judge:*

Pan American World Airways, Inc. (Pan Am) and Alert Management Systems, Inc. (Alert) (collectively Pan Am, defendants or appellants) appeal from final judgments entered on September 9, 1992 in the United States District Court for the Eastern District of New York (Platt, C.J.) in three cases arising out of the Pan Am Flight 103 terrorist bombing that occurred over Lockerbie, Scotland in December 1988. [*See* JA vol. II at 454-59.] The trial was bifurcated into a liability phase, binding on all plaintiffs whose cases were consolidated in this multidistrict litigation, and a damages phase governing the cases of the three plaintiffs before us. The damages phase will also set the standards for damage awards in future cases resulting from this tragic disaster.

Few Americans have forgotten the bombing of Flight 103 over Lockerbie, Scotland a few days before Christmas in 1988. There were 259 Americans aboard Pan Am's plane from all walks of life. Among the passengers were business executives, entrepreneurs, airline employees, and college students—including 38 Syracuse University students returning home from study abroad. Although four years have passed since this tragedy occurred, it remains vivid in our national consciousness, standing as a reminder of our collective vulnerability to wanton terrorist acts.

The 13-week liability trial controlled all the consolidated cases that had been filed against Pan Am throughout the United States by the passengers' and the crews' survivors and representatives. Trial began April 27, 1992. The jurors heard lengthy testimony from 58 witnesses, much of which was introduced by the over 180 depositions obtained during massive discovery taken worldwide. At its close, the jury rendered a special verdict finding defendants guilty of wilful misconduct that caused the explosion and the crash.

At the conclusion of the damages phase $9,225,000 was awarded to the Pagnucco family, $9,000,000 to the Bainbridge family, and $1,735,000 to the Porter family. Decedents Pagnucco and Bainbridge had been Pepsico attorneys, decedent Porter an electrician and part-time musician. The damage awards included damages for loss of society and damages for loss of parental care to adult children. No award for survival damages—sought by plaintiffs—was made because the jury found the passengers had suffered no conscious pain and suffering before their death. Pan Am and Alert appeal challenging the finding of liability and the damage awards.

BACKGROUND

Before briefly setting forth the familiar facts of this dire event, it is important for background purposes to recite earlier incidents that conveyed clear warnings that what actually happened at Lockerbie was a distinct possibility. These incidents place in perspective Pan Am's arguments that it acted in good faith.

In 1983 a Pan Am flight leaving Rome, Italy for New York was the target of a bomb planted in an unaccompanied interline suitcase. Disaster was only averted when Turkish authorities conducted a passenger/bag match that uncovered the suitcase. Pan Am knew of this type of sabotage—the same as that which caused the Flight 103 disaster—and that physical matches of suitcases were successful in averting such a disaster. (A. 1634, 4194). In 1985 a bomb hidden inside a radio and packed in an unaccompanied interline bag exploded on an Air India 747 over the North Atlantic, killing all aboard. (A. 720, 1636-37). The dangers of a bomb hidden inside radios packed in interline bags were well known to Pan Am and the airline industry. These two incidents led to the adoption of a Federal Aviation Administration (FAA) regulation at issue in this case, Air Carrier Standard Security Program or ACSSP XV.C.1.(a). (A. 4194).

In September 1986 Pan Am received a report from a group of Israeli security experts commissioned to review Pan Am security at various airports, including Heathrow and Frankfurt. The security experts concluded that "under the present security system, Pan Am is highly vulnerable to most forms of terrorist attack. The fact that no major disaster has occurred to date is merely providential." (A. 483). The report specifically cautioned Pan Am on the use of x-ray machines as substitutes for physical searches, and the dangers of interline unaccompanied bags. (A. 492). In October 1988 Alert Manager for Germany, Ulrich Weber, wrote a memo to New York headquarters citing the need for more personnel to remedy Frankfurt's security shortcomings. Only minimum efforts were made to remedy them.

Further, proof in the record showed that Pan Am was well aware of the dangers of terrorist attacks. In July, 1988 the FAA issued a Security Bulletin warning of the high threat of terrorist retaliatory attack because of the downing of an Iranian Jetliner. In November, 1988 Pan Am received an FAA Security Bulletin warning that a raid on a terrorist group had uncovered a bomb built into a Toshiba radio cassette player. (Toshiba Warning). The bulletin warned that the bomb was difficult to detect on normal x-ray. In December, 1988 Pan Am received an FAA Security Bulletin advising that the US Embassy in Helsinki had received a telephone warning that a Pan Am flight from Frankfurt would be bombed. (Helsinki Warning). The Helsinki warning came 14 days before the instant disaster, to which we now turn.

On December 21, 1988 a bomb exploded on Pan Am Flight 103 causing it to crash over Lockerbie, Scotland. The 243 passengers and 16 crew members aboard the flight traveling from London to New York all perished. Numerous plaintiffs, including those in the cases before us, brought wrongful death actions against Pan Am and Alert, a Pan Am affiliate that provided security services

in London and in Frankfurt, where Flight 103 originated. All those actions were consolidated for trial in the Eastern District of New York.

A single jury trial was conducted before Chief Judge Platt to try the liability issues common to the passenger cases. The parties agreed that the case was governed by the Warsaw Convention, formally named the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note (1988) [hereinafter Warsaw Convention]. Although the Warsaw Convention generally limits a carrier's liability for damages to $75,000 per passenger, Article 25 permits recovery of unlimited compensatory damages provided the carrier's "wilful misconduct" caused the damages. An earlier decision of this Circuit established that punitive damages may not be collected under the Warsaw Convention. *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988 ("Lockerbie I")*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

On July 10, 1992 the jury found that the defendants engaged in wilful misconduct that led to this fatal crash. The trial's liability phase centered on Pan Am's alleged noncompliance with FAA directives concerning baggage inspection, particularly with regard to unaccompanied baggage that might contain explosives. Additional proof was introduced regarding other alleged misconduct on the air carrier's part. Plaintiffs contended that the bomb entered the flight on an unaccompanied bag that Pan Am, through its wilful misconduct, failed to inspect and detect. Under plaintiffs' theory—detailed by several expert witnesses—the bomb was hidden inside a radio-cassette player packed in a bronze Samsonite suitcase. The suitcase supposedly traveled from Malta to Frankfurt on Air Malta Flight 180. There, the experts posited, it was transferred to the first leg of Flight 103 from Frankfurt to Lon-

don, where it was then placed on Flight 103 bound for New York.

Although bags transferred from other flights to Flight 103 in Frankfurt were x-rayed, plaintiffs asserted the airline's x-ray procedure violated security requirements contained in the FAA ACSSP, particularly those regulations ensuring that bags matched passengers and that any unaccompanied bags be physically inspected. Pan Am unsuccessfully argued to the jury that its actions did not amount to wilful misconduct, and that it was impossible to determine how the bomb was planted on Flight 103. To meet plaintiffs' claims of wilful misconduct, Pan Am and Alert emphasized that the transferred bags had been examined using x-ray equipment, but that no bomb was discovered. They challenged plaintiffs' theory of causation and suggested that even if there were any misconduct on their part, it did not lead to the crash.

In finding defendants liable the jury rendered a special verdict. On the special verdict form, it indicated that it had specifically found 1) that "Pan Am (including Alert) engage[d] in wilful misconduct," and 2) that the wilful misconduct was "a substantial factor in causing the disaster." [JA 1432] Following the liability phase, the jury then awarded compensatory damages in the three plaintiffs' cases. There are 207 other passenger cases pending, all awaiting the outcome of this appeal.

DISCUSSION

On appeal Pan Am rolls out a panoply of arguments, most involving evidence the district court excluded, and which, therefore, was not heard or considered by the jury. These contentions concern four broad areas: I) the exclusion of evidence related to Pan Am and Alert's alleged noncompliance with ACSSP regulations concerning unaccompanied baggage; II) the admission of evidence showing other alleged misconduct on appellants' part coupled with the disallowance of defense testimony concerning

alternate theories of causation; III) various other evidentiary rulings; and IV) the legal bases for the damage awards. In the discussion that follows, we examine each of these four areas in order.

I EXCLUDED EVIDENCE PAN AM AND ALERT ARGUE WOULD HAVE NEGATED ANY WILFUL MISCONDUCT ARISING FROM THEIR NONCOMPLIANCE WITH CERTAIN ACSSP REGULATIONS

Appellants insist the trial court committed reversible error in excluding several pieces of evidence that might have negated a finding of wilful misconduct based on appellants' alleged failure to comply with FAA regulations concerning unaccompanied baggage. This first challenge centers on rulings excluding three lines of evidence that appellants believe were relevant to Pan Am and Alert's state of mind, that is, their wilfulness. The main line of barred evidence purportedly demonstrated an oral waiver by the FAA, excusing Pan Am's compliance with relevant security regulations. The breach of those regulations was central to plaintiffs' case and, as a response, Pan Am and Alert sought to demonstrate that they thought they were complying with the FAA requirements.

The second piece of barred evidence was British regulations that did not require the observance of the same safety standards as did those of the FAA. Appellants sought to negate any inference of wilfulness on their part by showing that x-raying baggage transferred from other airlines—the procedure Pan Am followed—complied with the British regulations. The third piece of evidence not entertained was proof that some experts believe the highest threat to airline safety is not posed by unaccompanied baggage. Each of these three lines of evidence, appellants urge, might have negated plaintiffs' showing of wilful misconduct.

The standard of liability under the Warsaw Convention, as already noted, requires that a carrier have engaged in "wilful misconduct" causing the claimed losses in order for plaintiffs to hold a carrier liable in an amount exceeding the Convention's $75,000 damage limit. *See* Warsaw Convention, art. 25. Wilful misconduct under the Convention means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions. *See Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993); *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1479 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991). The district court charged the jury under that standard and also charged it that the standard applied whether wilful misconduct resulted from an act or failure to act by the carrier. [TR. 6557—charge as to wilful misconduct]. Appellants do not challenge the district court's jury instruction as to wilful misconduct. Instead, they focus on the just recited three different lines of proof they were not allowed to present to guide the jury's applications of that standard, that is, the oral waiver, the British regulations, and expert testimony regarding the threat posed by unaccompanied baggage.

A. *The Alleged Oral Waiver*

We begin discussion by reference to the standard of review on appeal from an exclusion of evidence at trial. That standard establishes that the relevance and admissibility of proffered evidence rests in the sound discretion of the trial court. *See, e.g., United States v. Caming*, 968 F.2d 232, 238 (2d Cir.), *cert. denied*, 113 S. Ct. 416 (1992); *United States v. Ebner*, 782 F.2d 1120, 1126 (2d Cir. 1986). Defendants maintain that an FAA official granted them an oral waiver excusing strict com-

pliance with certain FAA regulations, and that Chief Judge Platt abused his discretion when he disallowed their evidence purporting to demonstrate their belief in this waiver. Although Pan Am is imprecise as to the date of the purported waiver, it asserts it was given verbally to a Pan Am official. Virtually no written documentation supports it. Defendants' argument essentially is that this evidence would have shown that their x-ray inspection of interline bags complied with FAA requirements or that, regardless of FAA requirements, they did not act with conscious or reckless disregard of the probable consequences of their x-ray procedures since they thought the safety precautions they were following were permissible.

1. *The Unambiguous Nature of ACSSP Regulation XV C.1.(a)*

In support of this point, Pan Am points out that a regulation may be interpreted orally, and that the regulation at issue is ambiguous and therefore susceptible to such an interpretation. We are unable to accept appellants' premise that the supposed oral waiver was in fact an interpretation of an ambiguous regulation. As a matter of law the FAA regulation at issue here—ACSSP XV C.1.(a)—is not ambiguous, as the following discussion demonstrates.

In April 1986 the FAA established specific ACSSP regulations and mandated that they be followed at heightened security airports designated "extraordinary security" airports. [*See* ACSSP XV C. at JA 4014] Both Frankfurt and London's Heathrow airports were classified as "extraordinary security" airports. The central regulation at issue in this case, ACSSP regulation XV C.1.(a), [*see* JA 4017] concerns the detection of unaccompanied bags. It directs an air carrier operating out of an extraordinary security airport to

> [c]onduct a positive passenger/checked baggage match resulting in physical inspection or noncarriage

> of all unaccompanied bags. The carrier may use either physical match or administrative match, but, in either case, it should be done in a way that passengers are aware of the use of the procedures.

Air carriers like Pan Am, thus were required under the regulations first to do a physical or an administrative match to detect unaccompanied bags, and then to physically inspect any unaccompanied bags before they could be loaded. ACSSP XV C clearly ordered that an air carrier operating out of an extraordinary security airport "shall adopt and carry out the . . . special procedures except where local conditions preclude and alternative measures have been approved by the FAA."

Under ACSSP XV C.1.(a) the positive match is designed to ensure that any unacompanied bags definitely will be identified as such. The regulation permits the positive match to be done either as a "physical match," in which passengers identify their bags on the tarmac, or an "administrative match," in which the number of passengers boarding the aircraft and the number of bags checked are compared with the number of bags to be loaded.

Pan Am claimed that it conducted an administrative match. Plaintiffs averred that this administrative match did not comply with the regulations because it was incomplete and failed to identify all unaccompanied bags. Particularly, plaintiffs point out Pan Am's procedures did not identify the bags of interline passengers, *i.e.*, those passengers who had transferred to a Pan Am flight from another airline and whose bags had been checked with the other airline at the passengers' point of origin.

If a match conducted under the regulations revealed unaccompanied bags, the regulations expressly directed the airline to conduct the second step of the process, "physical inspection," before it could carry the bags. ACSSP XV C.1.(a). Plaintiffs demonstrated that Pan

Am and Alert x-rayed all bags transferred from other carriers—so-called "interline" bags—but conducted no other inspection of such bags. Pan Am and Alert assert that physical inspection could be interpreted to mean an x-ray inspection. For several reasons, we think this a strained reading of the unambiguous regulation.

First, the FAA promulgated "Physical Inspection Guidelines" in the ACSSP which specified that physical inspection involves opening and inspecting all compartments of baggage. [JA 4033] The guidelines do not mention x-ray as an acceptable means of inspection. Second, the jury heard testimony from Pan Am's own General Manager at Heathrow, and other witnesses as well, that physical inspection under the regulations involved opening up bags and that x-raying them did not satisfy the regulation. [e.g., SA 209]. Third, ACSSP regulations applicable at other, lower security airports explicitly permitted x-ray *or* physical inspections. [JA 4016]. Thus, it is plain that the regulations applicable at Frankfurt and London's Heathrow were unambiguous: they did not permit x-ray inspections as a substitute for a physical inspection. Appellants' reliance on *United States v. Eastern Air Lines, Inc.*, 792 F.2d 1560, 1563 (11th Cir. 1986), is inapposite because that case involved a more broadly worded regulation, one susceptible to different interpretations.

We hold, therefore, that the district court did not err in refusing to allow witnesses—like the co-chair of the Pan Am Security Task Force, Richard Cozzi—to testify that they thought the regulations were ambiguous. As a matter of law, ACSSP XV C.1.(a) is not ambiguous in requiring a positive match and physical inspection of unaccompanied bags before they may be carried on board a departing plane. Introducing testimony to the contrary would have invaded the court's function of determining the law and instructing the jury as to that law. *See FAA*

v. Landy, 705 F.2d 624, 632 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983).

2. *Proof of the Alleged Oral Waiver*

Given that the FAA regulation in question is not ambiguous, Pan Am next asserts it obtained an oral waiver of the regulation from the FAA and that the district court erred in disallowing evidence of that waiver. But since FAA regulations state that any waiver of its requirements must be obtained from the FAA in writing, appellants would not have been justified in relying on an oral waiver. Without a reasonable basis to argue that their conduct in conducting baggage inspections by x-ray was permissible, the trial court did not abuse its discretion in refusing to admit testimony regarding an alleged waiver. Belief in such a waiver under the circumstances would be unjustified and unreasonable, and such a belief would not have been properly introduced to negate a showing of wilfulness. In short, the theory under which appellants sought to introduce the purported oral waiver lacked a sufficiently sound foundation to be admissible at trial.

Evidence showed that as of April 1986 Pan Am established procedures to ensure that unaccompanied interline bags were not carried on its airlines. However, the process for identifying unaccompanied interline bags proved too "cumbersome" and expensive. (A. 1925). Pan Am therefore stopped performing a match for interline bags in London in February 1987 and in Frankfurt in July 1988. It also eliminated physical searches of unaccompanied interline bags. Thereafter bags were simply x-rayed and put on board, rather than matched against particular tickets. [Tr. 3855-56, 3876; Pan Am Br. 11]. This was a violation of ACSSP XIV that requires Pan Am to advise the FAA in writing if interline bag match has been discontinued. (A. 4234).

It is apparent therefore from the record that Pan Am made no distinction on Flight 103 between interline ac-

companied versus interline unaccompanied bags. Most significantly, the Flight 103 pilot was not informed about the presence of unaccompanied interline bags, in violation of ACSSP XIIII E. (A. 4210-13). Pan Am managers allegedly instructed gate employees in London not to advise pilots of unaccompanied bags because it made crews "jittery." (A. 167).

What remains central to appellants' defense is their reliance on x-ray alone to inspect interline bags transferred to Flight 103. They sought to introduce evidence that at 1986 and 1987 meetings, mostly with unidentified FAA officials, oral permission was purportedly given to Pan Am to allow it to deviate from the ACSSP regulations. Because of that waiver, they contend, they were in compliance with FAA requirements. They thus sought to show that their noncompliance from the letter of the regulations was excused by an exemption.

The fatal flaw in this proffered defense is that the regulations do not allow the granting of an oral waiver. The relevant regulations expressly require a *written application* for a waiver and *written FAA approval* based on certain findings. *See* 14 C.F.R. §§ 11.25, 11.27(e), 108.7(a)(2), 108.25(b)-(c) (1993); *see also* 49 U.S.C. §§ 1357(a)(2)(B), 1421(a)(6) & (c). The Director of the Office of Civil Aviation Security at the FAA at the time of the Pan Am bombing, Raymond Salazar, testified that in order to obtain an exemption from an ACSSP regulation an air carrier would have to file a written request and follow a specific procedure that was then in place. [JA 2028-37] Salazar further denied ever granting an oral waiver to any Pan Am official or for that matter to any other air carrier. [JA 2036-37] His predecessor at the FAA, Billie Vincent, testified to the same effect that *written* authorization and approval were required for exemption from ACSSP requirements. [JA 4167-68].

Salazar was asked by plaintiffs to testify whether he had ever granted an oral waiver to a Pan Am official. The purpose of the question was to get an explanation of a statement contained in a Pan Am e-mail (electronic mail) memorandum. Plaintiffs produced the e-mail message that Pan Am security officer Daniel Soneson had sent to the regional Pan Am security representatives at Heathrow and Frankfurt. The e-mail message, dated March 28, 1988, stated in part, "the Dir. FAA R Salizar has granted x ray as and [sic] alternative to searching pass. baggage." [JA 560] Salazar testified that that representation was inaccurate and a misrepresentation, and when pressed by counsel, characterized it as "a falsehood." [JA 1278-80].

Despite requirements that exemptions be in writing, Pan Am offered no proof that it had ever applied for a written exemption from the provisions of ACSSP XV C.1.(a) at Heathrow or Frankfurt. There was evidence that Pan Am had made written applications on other occasions for exemptions from ACSSP XV C.1, 2, and 3, indicating that Pan Am was aware of the proper procedure for requesting a waiver. [JA 730—exemption sought at Berlin by Soneson.] Further, Pan Am's Chairman, Thomas Plaskett, admitted the airline knew waivers had to be in writing. [SA 198-203.]

Although the FAA regulations occupied a key role in the trial of this case, it must be kept in mind that Pan Am and Alert's compliance with them is not dispositive of the outcome. As appellants acknowledge in their brief, and as the court instructed the jury, proof of full compliance with the ACSSP would not necessarily provide appellants with a complete defense against a claim of wilful misconduct. FAA regulations only establish minimum requirements for air carriers. A jury could conceivably find certain circumstances under which an air carrier had committed wilful misconduct even though it followed FAA regulations to the letter. Similarly, noncompliance

with ACSSP procedures will not necessarily lead to a *per se* finding of wilful misconduct. A carrier might not have acted with wilful misconduct, even were it to have failed to comply with an FAA regulation. The issue we are called upon to decide, thus, is whether Pan Am's alleged oral waiver should have been admitted as relevant evidence with respect to the overarching question of wilful misconduct.

While compliance with FAA requirements does not necessarily determine the instant case, we are not insensitive to the importance Pan Am's verbal authorization defense might have had to its case were it to have been allowed. The important and difficult question presented is whether Pan Am's purported belief that it was granted an oral waiver must be admitted even when the surrounding circumstances strongly suggest that such belief is unjustified and unreasonable. The issue pits defendants' insistence that it is entitled to present all the evidence available with respect to its actual state of mind and let the jury decide how credible it is against a policy that counsels against allowing a sophisticated, well counseled party to litigation successfully to urge that it misunderstood the law.

(a) *Proposed Testimony*

The excluded evidence concerning the oral waiver primarily involved the testimony of two witnesses. We are told that the first witness, Daniel Soneson, would have testified that he approached the FAA in 1986 and received a verbal authorization for the x-ray-only inspection of interline bags, though he could not recall who gave this authorization. He would have testified further, so defendants state, that at an October 1987 meeting with Salazar and others he was advised that x-ray inspection would comply with ACSSP requirements. The trial judge suggested that an offer of proof outside the presence of the jury be made regarding this witness'

proposed testimony, but for some reason Pan Am chose not to make such an offer:

> COURT: . . . . I have no objection to your taking the testimony outside of the presence of the jury as to enable you to argue to the Court of Appeals I have misinterpreted *Berg* and *Schwartz* and various authorities that have been established.
>
> MR. CODDINGTON: I don't wish to do that now, Judge.
>
> THE COURT: To protect your record, maybe you'd better.

(JA 3005). Moreover, our faith in the defendants' versions of Sonenson's testimony is not enhanced by the fact that Sonenson's 1990 deposition testimony is substantially inconsistent with the representations made by the defendants before us. Simply put, the defendants refused to put Sonenson on the stand for their own reasons, and yet want us to accept at face value representations not made under oath, not subject to cross-examination, and in fact inconsistent with prior testimony made under oath. *See, e.g., Fortunato v. Ford Motor Co.,* 464 F.2d 962, 967 (2d Cir.), *cert. denied,* 409 U.S. 1038 (1972) (stating that appellate court will not "permit a party to allege on appeal what it failed to claim to the trial court," since that "would allow a party to obtain a new trial simply on its claim that it would have proven a certain fact or facts had it been given a chance"); *Moss v. Hornig,* 314 F.2d 89, 93 (2d Cir. 1963) (holding that an appellate court cannot be expected to reverse where there was no offer of proof, and "where the significance of the evidence sought to be introduced is not obvious"); *Marrone v. United States,* 355 F.2d 238, 241 (2d Cir. 1966) (holding that the failure to make an offer of proof to demonstrate the significance of excluded testimony "must be held to be

fatal," even where persuasive authority indicated that the district court should have allowed the testimony).

The second witness proffered by the defense was a former co-chair of the Pan Am Security Task Force, Richard Cozzi. Although Cozzi testified at trial, he was not permitted to testify as to Pan Am's purported verbal authorization from the FAA. Since his proposed testimony was preserved, we can see he would have testified that the Task Force in late 1986 wanted to find out if x-ray of interline bags would comply with the ACSSP, even though some members were doubtful it could comply; the Task Force instructed Soneson to check with the FAA as to whether inspection by x-ray satisfied the ACSSP; and Sonenson reported back that he had done so and that the FAA said that x-ray inspection of interline bags would comply with the requirements. [JA 3261+] Even had Cozzi been permitted to testify on this issue, his statement respecting what Soneson reported would have been inadmissible hearsay and would not have been admissible at trial in any event.

Additional evidence appellants sought, but were not allowed, to introduce to show the supposed appropriateness of their procedures included testimony concerning a September 1988 FAA inspection at Heathrow at which Pan Am was not cited for violating ACSSP XV C.1.(a). [JA 4356-59, 4368].

(b) *Trial Court's Rulings*

In a series of oral rulings repeated throughout the record, the trial judge stated that any testimony by defense witnesses as to the purported verbal authorization would be excluded. It treated the proffered defense as an attempt to mount a so-called government authorization defense, the bounds of which will be discussed shortly. Chief Judge Platt believed that a government authorization defense may only be predicated on authorization from a government official with power to grant such authoriza-

tion. He held the defense unavailable because anyone who might have given a verbal exemption at the FAA would have had no authority to do so. The trial court also observed that any evidence as to a verbal authorization would be irrelevant since Pan Am was charged with knowing the regulations, including those that stated amendments and exemptions to the regulations must be in writing. [e.g. JA 3961-62].

Before analyzing the government authorization defense, we briefly discuss defendants' alternative argument for permitting the introduction of the verbal authorization defense: to rebut Salazar's statements concerning Soneson's e-mail message, which plaintiffs had introduced into evidence. A trial court may in the interests of fairness allow otherwise inadmissible evidence on an issue when necessary to rebut a false impression left by inadmissible evidence introduced by an opposing party. *See, e.g., United States v. Rea*, 958 F.2d 1206, 1225 (2d Cir. 1992). But whether to entertain such sort of proof is left squarely in the trial judge's discretion since the presider at trial is in a better position to assess how to conduct it fairly than is an appellate court reading the record.

Here the district court did not abuse its discretion in declining to admit the evidence. It directly offered Pan Am and Alert a curative instruction, stating, "[o]n the so-called verbal authorization, . . . [i]f they want me to give the jury an instruction to disregard the testimony that came in at the outset of the case before I understood what the issue was, I will be glad to give that instruction." [JA 3073-74] Since appellants refused to ask for that instruction, they waived any complaint as to harm they may have suffered due to Salazar's characterization of Soneson's e-mail as inaccurate. *See United States v. Grubczak*, 793 F.2d 458, 461-62 (2d Cir. 1986).

Nor is there merit in Pan Am's contention that it was an abuse of discretion to exclude testimony regarding a September 1988 FAA inspection at which Pan Am was

not cited for violations relating to its x-ray procedure. Other evidence that was before the jury showed FAA inspections of Pan Am operations at Heathrow and Frankfurt had not resulted in any FAA citations. [JA 4076-77].

Now turning to the government authorization defense, the plaintiffs' argue initially that Pan Am failed to make a proper offer of proof with respect to the evidence they sought to introduce. In fact, as noted above, the defendants expressly declined to make a formal offer of proof with regard to Sonenson's testimony. Assuming for the purposes of resolving the issue that there was a valid offer of proof, we note that the parties and the district court frame the legal issue they faced in different ways. Chief Judge Platt thought the offer of proof was an attempt by defendants to mount a government authorization defense. Defendants assert it was proof probative of defendants' states of mind. Our view of this issue is that the proffered proof is most appropriately treated as an attempt by defendants to invoke what is often referred to as a "mistake of law" defense.

(c) *Mistake of Law as a Defense in General*

We believe what appellants sought to present at trial was essentially a mistake of law defense, that is to say, defendants thought what they were doing was in accordance with the law and, even if they were mistaken, they think under such a circumstance they should not be held liable for wilful misconduct. Yet, contrary to appellant's view, even were a mistake of law defense one that could be successfully interposed, it would not necessarily absolve Pan Am of liability in this Warsaw Convention case. The same standards governing the availability of a mistake of law defense govern even when the defense might not supply a complete defense to liability—in this case, for example, the jury might have found that complying with the FAA minimum requirements was still inadequate under the circumstances on the ultimate issue of wilful misconduct. The usual standards defining the permissi-

bility of a mistake of law defense are as effective where the mistaken law is a regulation. *See United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (noting "principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation").

It has long been a maxim that "ignorance of the law is no excuse." The reason for this ancient rule is not because everyone knows the law, but because ignorance of it is a ready excuse easily raised and difficult to refute. We and the Supreme Court regularly acknowledge that a mistaken view of the law usually will not serve as an acceptable defense. *United States v. Durrani*, 835 F.2d 410, 422 (2d Cir. 1987); *Cheek v. United States*, 498 U.S. 192, 199 (1991). While cases where the rule is cited typically involve criminal offenses, *see, e.g., Cheek*, 498 U.S. at 199, it applies equally in civil cases. *See Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (Story, J.) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally . . . ."); *Ruley v. Nelson*, 106 F.R.D. 514, 518 (D. Nev. 1985) (noting ignorance of law is no excuse in civil or criminal law).

Important exceptions to the general rule that a mistake of law is no defense of course exist. Two of them are relevant to the present case. They are, first, the government authorization exception, *see, e.g., Durrani*, 835 F.2d at 422; *United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984), and, second, the exception recognized when the standard of liability involves specific knowledge of a law, *see, e.g., Cheek*, 498 U.S. at 199-200; *United States v. Golitschek*, 808 F.2d 195, 202-03 (2d Cir. 1986).

With respect to the first exception, Chief Judge Platt correctly ruled that a government authorization defense would not be available to Pan Am and Alert. Such defense requires the defense to demonstrate "legitimate reliance on an official interpretation of law." *See Durrani*,

835 F.2d at 422-23. Under our case law, the official on whose interpretation the defendant allegedly relied must have actual authority. *See Duggan*, 743 F.2d at 83-84 (mistaken belief that individual had apparent government authority did not warrant submission of defense to jury); *see also United States v. Schwartz*, 924 F.2d 410, 422 (2d Cir. 1991).

Here all the evidence demonstrated that amendments to or exemptions from ACSSP XV C.1.(a) had to be made in writing by the FAA following written application. Both Salazar and Vincent testified that as Directors of the FAA Office of Civil Aviation Security they did not have the authority to alter the ACSSP orally. The regulations support this view, as did testimony of Pan Am's own witnesses. Pan Am's attempted government authorization defense was therefore properly precluded by the district court because the FAA officials allegedly contacted simply did not have the actual authority to grant any verbal authorization for Pan Am's x-ray-only inspection of interline bags.

The second exception—where a liability standard involves knowledge of a rule—received scant attention in the trial court and in the appellate briefs, even though it is extremely important in the case at bar. Under that exception, mistake of law becomes a valid defense when the standard of liability requires an actor's specific intent and that intent or state of mind involves a knowledge of a legal rule or regulation. *See Golitschek*, 802 F.2d at 203. This seems to be what Pan Am and Alert are driving at in their reliance on *Vinieris v. Byzantine Maritime Corp.*, 731 F.2d 1061 (2d Cir. 1984).

Vinieris involved a statute that required "conscious misconduct" be proven for a seaman to recover under the penalty provision in a wage-withholding statue. We held that any evidence relevant to the ship captain's state of mind in withholding wages had to be admitted. *Id.* at

1064. Unfortunately, that case does not resolve the issue presented here as easily as defendants suggest.

Under the recognized exception to mistake of law, the particular statute at issue must be examined to determine the statute's liability requirements. The statute's inclusion of terms like "wilful," "conscious" or "knowing" do not dispose of the question. As we recognized *in Golitschek*, 808 F.2d at 202, a defendant "must be proven to have whatever state of mind is required to establish [the] offense, and sometimes that state of mind includes knowledge of a legal requirement." As a corollary, the defense often will attempt to show an absence of knowledge of that requirement.

(d) *Wilfulness Under the Warsaw Convention*

The question we must answer concerns the bounds of the "wilfulness" requirement in the wilful misconduct language of the Warsaw Convention. In *Cheek v. United States*, 498 U.S. 192 (1991), now a seminal case in the area, the Supreme Court declared that the term "wilfully" in federal criminal tax statutes carved out an exception to the general maxim that ignorance of the law is no excuse. *Id.* at 199-200. The Court said that the wilfulness requirement in the tax laws required the defendant to be allowed to introduce evidence as to any belief—no matter how objectively unreasonable that belief might be—tending to show an unawareness of a legal duty on defendant's part. *Id.* at 203. It rejected the notion that under the tax laws only objectively reasonable defenses to wilfulness should be permitted.

In doing so, the Supreme Court carefully limited its decision to the tax field. It emphasized "the complexity of the tax laws," 498 U.S. at 200, the difficulty of the "average citizen" in comprehending duties imposed by the tax laws, *id.* at 199, and constructions of the term "wilfulness" in the tax context, *id.* at 201. Our subsequent decisions and those of other courts acknowledge *Cheek's*

limited application to the criminal tax context and refuse to apply it to non-criminal and/or non-tax statutes. *See, e.g., United States v. Caming*, 968 F.2d 232, 240 (2d Cir.) (collecting other circuits' cases refusing to extend *Cheek* to non-tax criminal statutes), *cert. denied*, 113 S. Ct. 416 (1992). Hence, *Cheek* does not govern the question we must resolve of wilfulness under the Warsaw Convention. This case is quite different from *Cheek*, which dealt with wilful misconduct in the tax context.

Appellants insist nonetheless that any evidence as to their actual states of mind is admissible to show wilfulness required by the Warsaw Convention. The issue is whether appellants must be allowed—like the defendant in *Cheek*—to present any evidence relating to their subjective beliefs, no matter how unreasonable those beliefs might be, or whether appellants should be limited to presenting only objectively reasonable mistakes of law to negate any wilfulness on their part. *Cf. United States v. Squires*, 440 F.2d 859, 864 (2d Cir. 1971) (stating "whenever a defense of ignorance of the law . . . is claimed, it is recognized that one may not deliberately close his eyes to what otherwise would have been obvious to him").

(e) *Resolution of Mistake of Law Defense in This Case*

We see no reason that would prompt us to view heavily regulated air carriers—certified by the FAA and charged with knowledge of the relevant statutes and regulations under which they operate—the same as individual taxpayers who face the daunting task of unraveling the complexities of the Internal Revenue Code. There is cause to be wary because of the ease with which air carriers could fabricate sham defenses and ignore with impunity safety regulations. Instead, where one of the handful of corporations in the business of transporting the public by air asserts a mistake of law as its defense to wilful misconduct under the Warsaw Convention, it may only present its objectively reasonable beliefs as to the law's require-

ments. To state this in other words, because of the legal status of the FAA regulations and the duty of air carriers to know and follow them, an absence of wilful misconduct—when based on a claim of a mistaken understanding of those regulations—must be supported by objectively reasonable evidence as to that mistaken understanding. When a law, rule or regulation that pertains to passenger and crew safety is clear and no reasonable air carrier would have believed it was authorized to act in contravention of it, we hold that an air carrier may not successfully mount a defense based on its assertion that it did not know the law.

Our holding is narrow. We reiterate the standard we adopt to emphasize its limitations: in a case brought under the Warsaw Convention involving violations of FAA regulations that pertain to the safety of those aboard an aircraft, against a defendant air carrier charged with knowing and following those regulations, only an *objectively* reasonable belief by defendant that its conduct was authorized under the law will be a valid defense that may be presented to the jury. An inference of wilful misconduct based on FAA regulation violations cannot be negated through evidence falling short of a good-faith and objectively reasonable belief that the violations were excused.

In the instant case the evidence offered by Pan Am and Alert fell far short of that standard. Given clear and unambiguous requirements that alterations in the ACSSP be obtained in writing, Pan Am and Alert's alleged belief that they were following FAA requirements was not objectively reasonable. Thus, the evidence relevant to defendants' belief that they were doing what was required was properly excluded.

B. *British Regulations*

Appellants' second contention regarding wrongful exclusion of evidence concerning wilful misconduct relates to British air safety regulations. Appellants sought to

introduce British Department of Transportation documents and deposition testimony from James Jack, the Principal Aviation Security Advisor for the British Department of Transportation, in which he explained that Pan Am's reliance on x-ray interline bags would have complied with British security directives. [JA 288-89,91,94].

With respect to the exclusion of the documentary evidence there was no abuse of discretion. That evidence was proffered in the form of British Department of Transport documents and notably included circulars not having the force of law. In addition many of the documents were no longer in effect at the time of the accident. [Tr 3780-85]. This proof was properly ruled inadmissible as irrelevant, vague, and remote.

The refusal to admit Jack's deposition is more problematic. The district court stated that it would not admit Jack's testimony about British regulations unless Pan Am and Alert stipulated that they had violated the ACSSP. Pan Am and Alert understandably refused to make such a potentially prejudicial stipulation. The trial court then suggested that Pan Am and Alert had to choose between claiming they followed the ACSSP or claiming that they violated it, but their wilful misconduct should be judged by local security regulations. [JA 3198-3200].

We agree with Pan Am that it was error to force them to choose between alternate defenses. Alternate and inconsistent defenses are permitted in civil trials. *See* Fed. R. Civ. P. 8(e)(2); *Mathews v. United States*, 485 U.S. 58, 64 (1988); *Kibby v. United States*, 372 F.2d 598, 601 (8th Cir.), *cert. denied*, 387 U.S. 931 (1967). The district court had no authority to exclude evidence on the ground that it supported a defense not consistent with Pan Am and Alert's alternate theory.

Nor could Jack's deposition be excluded on relevancy grounds. [JA 3191] It was relevant to Pan Am and Alert's liability, particularly since evidence demonstrated

that as a U.S. air carrier operating out of Heathrow, Pan Am was subject to both FAA regulations *and* the security regulations of the British government. [Tr. 4274; JA 3197] This proof offered by Pan Am to undercut the allegation that it consciously or recklessly disregarded the probable consequences of its x-ray procedures, clearly was relevant.

This is particularly so since the federal rules establish a generous standard of relevance that provides for the liberal admissibility of evidence tending to make more or less probable "any fact that is of consequence to the determination of the action." *See* Fed. R. Evid. 401, 402. While the jury may or may not have accorded Jack's testimony much weight, it was an abuse of the trial court's discretion to exclude it. A showing that Pan Am and Alert complied with British security directives—whether or not they violated the ACSSP—might have made it somewhat less likely to believe that they acted recklessly in adopting an x-ray-only approach to inspecting interline bags.

Nevertheless, though it was error to refuse to permit the few pages of Jack's deposition testimony to be read to the jury, it was harmless error. A ruling is harmless when we are fairly assured that admitting or refusing to admit certain proof had no substantial effect on the jury's verdict. *See United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992). Here the district court did permit Pan Am to adduce some testimony that its conduct comported with British regulations. The jury had that point before it. [Tr. 3839-43]. Further, plaintiffs' case rested principally on Pan Am and Alert's ACSSP violations, not on whether appellants violated British government's security regulations. The bulk of the evidence regarding the x-ray procedures concerned the issue of ACSSP violations, the importance of conducting a passenger/bag match, and appellants' purported knowing or reckless behavior in failing to follow FAA regulations.

Moreover, Pan Am and Alert presented a strong defense to the jury that even if they violated the ACSSP, their actions did not amount to wilful misconduct. They insisted that a bomb contained in a suitcase would have been visible on x-ray. In fact, the parties stipulated to that fact. Appellants' counsel emphasized in closing argument and elsewhere the safety and expense of the x-ray technology purchased and employed by Pan Am, the fact that even an untrained person could spot a radio on one of their x-ray machines, and made the point that FAA inspections had shown Pan Am x-ray equipment to be in compliance with regulations. [JA 6485-95]. Dr. Grodzins, an MIT professor, testified regarding the effectiveness of x-ray examination of baggage. [Tr. 5742-43] It simply cannot be supposed on the entirety of the voluminous record that Jack's several pages of deposition testimony would have substantially influenced the verdict, given the fact that the closely related defense that Pan Am presented failed to persuade the jury.

C. *"Highest" Threat Evidence*

The last of the three wrongfully excluded wilful-misconduct-evidence assertions raised by Pan Am is the court's refusal to allow evidence that bombs in unaccompanied baggage did not pose the "highest threat" to airline safety. Appellants sought to introduce this evidence to refute the view of one of plaintiffs' experts that unaccompanied bags pose the greatest risk to airline security.

Pan Am and Alert sought to elicit testimony from their terrorism expert that unaccompanied bags do not pose the highest threat to airline safety; instead, unsuspecting couriers pose that threat. Plaintiffs' expert, Billie Vincent, had very briefly testified [JA at 4202] that the unaccompanied bag poses the "highest threat" to airline safety. The defense sought to rebut this position through their expert, Dr. Ariel Merari. They contend Vincent's testimony left a false impression as to Pan Am's degree

of awareness of the probable consequences posed by unaccompanied baggage.

Although the district court did not admit the defense expert's testimony, it agreed to give an instruction that there was no evidence to show that unaccompanied bags posed the greatest security threat and that the jury should disregard any such opinion. [JA at 3465.] Since such a curative instruction was given, [TR. 6563] any risk that Vincent's brief, qualitative testimony was improperly considered by the jury was removed. *See, e.g., United States v. Tutino,* 883 F.2d 1125, 1137 (2d Cir. 1989), *cert. denied,* 493 U.S. 1081 (1990). Thus, no abuse of discretion resulted from the exclusion of further testimony on this peripheral subject.

II ADMISSION OF OTHER MISCONDUCT EVIDENCE BY PAN AM AND ALERT AND EXCLUSION OF PAN AM AND ALERT'S ALTERNATIVE SUGGESTIONS OF CAUSATION

Pan Am and Alert's second major line of argument concerns what it thinks was an error in the trial court's admitting other evidence of misconduct on their part, while at the same time excluding the testimony of several of their witnesses who, they assert, would have presented alternative theories of causation. We examine each of these challenged rulings separately.

A. *Evidence of Appellants' Alleged Other Misconduct*

Appellants complain of evidence received to show other acts of alleged misconduct by the airline. This evidence of Pan Am's and Alert's other misconduct is divided into two categories—SECURITY VIOLATIONS ON FLIGHT 103 and THE "ALERT" SECURITY PROGRAM. With respect to the former alleged misconduct, the proof was as follows: (1) Ulrich Weber, the head of Alert in Frankfurt had been convicted in the U.S. of passing bad checks eight years before he was hired by

Alert and had been fired after the disaster at Lockerbie for using a company credit card in a brothel [JA 2332, 2337]; 2) the ramp around Flight 103 had been left unguarded in violation of ACSSP when the Alert employee assigned to guard it felt ill and went inside [JA 2165]; 3) Alert employees were inadequately trained, particularly employee Sabine Fuchs who could not explain what a "selectee" was even though her job was to pick "selectees" out from passengers for further screening [JA 2348, 2688-71]; one security agent for Flight 103 was an "alternate" who had only two to three hours of training and did not know what the ACSSP required. (A. 1979-86). She thought someone else was monitoring the baggage. (A. 2015-16). 4) Critical to this case is the fact that the x-ray technician for the flight, the only defense against the bomb, had been employed for only seven weeks, had no formal training, and had not been tested. (A. 3376-3399). He had never heard about the Toshiba warning.

The proof regarding THE "ALERT" SECURITY PROGRAM revealed first, that it was neither related to security, nor was it a program. Instituted by Pan Am in May 1986 during a period of sharp decline in international travel due to terrorist attacks, the program was a misleading public relations ploy designed to make would-be travelers feel more secure. An advertisement signed by Pan Am's chairman of the board and CEO was placed in the *New York Times* and other publications:

> Dear Air Traveler:
>
> On June 12, 1986, Pan Am will initiate one of the most far-reaching security programs in our industry, a program that will screen passengers, employees, airport facilities, baggage, and aircraft with unrelenting thoroughness.

(A. 479). The campaign also featured TV ads. As part of the program, Pan Am imposed a security surcharge on

international passengers to pay for the promised additional security measures. The surcharge generated $18 million in annual revenue. The security surcharge was $5 each way on overseas tickets—many Fight 103 passengers paid the surcharge—but proceeds from the surcharge were not earmarked for security and instead were commingled with Pan Am's general funds (A. 1580). Alert's first president, Fred Ford, wrote a memo to Pan Am senior executives stating that the promised security program was not being put into effect and that passengers would complain "What do I get for my surcharge?" (A. 1580).

The evidence revealed, second, that Alert added more guards during FAA inspections to make it appear that more guards were on duty than generally was the case [JA 2215-20, 2934]; this included on one occasion having a guard from the front end of an airplane sent to the back when FAA inspectors come on board so that the inspectors would think that there was a guard at both places. (A. 2217). Third, in 1986 Pan Am declined to adopt security recommendations made to it by the Israeli security consulting firm, KPI, which criticized Pan Am's reliance on x-ray and emphasized Pan Am's vulnerability to terrorist attack [JA 482-98]. Fourth, untrained sniffing dogs had been paraded in front of ticket counters at Kennedy airport [JA 1578] to create an appearance of security which did not otherwise exist. (A. 2217-20).

Appellants' motion to exclude proof not tied to the Air Malta theory of causation (that the bomb bag came from an interline transfer) was denied by the trial court. It observed that since appellants planned to contest the Air Malta theory, plaintiffs were entitled to present evidence of alleged other misconduct on defendants' parts. The trial judge reasoned that even if the Air Malta theory did not explain the bomb's presence on Flight 103, other pervasive and extensive wilful misconduct by defendants must have accounted for the bomb's presence. Following

this general ruling, no specific objections were made to the individual pieces of evidence listed above on any other grounds. Other objections that might have been raised were waived. Accordingly, we review this as a general ruling permitting the introduction of evidence showing prior misconduct, unrelated to the Air Malta theory.

This proof that Pan Am acted with wilful misconduct through recklessly disregarding passenger safety in general, with knowledge of the probable consequences of that disregard, was properly received. Although Fed. R. Evid. 404(b) provides for the exclusion of prior misconduct evidence in order to show "character" or action "in conformity therewith", we follow the inclusionary approach to prior misconduct evidence that allows the admission of prior misconduct for any other relevant purpose. *Ismail v. Cohen,* 899 F.2d 183, 188 (2d Cir. 1990).

Plaintiffs asserted that a contempt for security pervaded Pan Am from the highest to the lowest levels of the corporation, and that the totality of security failures would permit the jury to infer wilful misconduct. We have approved consideration of the totality of a defendant's wrongdoing in determining whether wilful misconduct existed. *See Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1164 (2d Cir. 1978), *cert. denied,* 440 U.S. 959 (1979); *see also United States v. Daly,* 842 F.2d 1380, 1388 (2d Cir.) (background evidence may be introduced to "furnish an explanation of the understanding or intent with which certain acts [are] performed"), *cert. denied,* 488 U.S. 821 (1988).

While Pan Am insists that causation was not established and that therefore the objected to wilful misconduct evidence was speculative and unrelated as a cause of the crash, we think the question of whether it had a causative effect was properly submitted to the jury.

In other areas of the law, causation may be established when an increasing number of defendant's faults creates an inference that the totality must have caused the harm. *See In Re Marine Sulphur Queen,* 460 F.2d 89, 99-100 (2d Cir.), *cert. denied,* 409 U.S. 982 (1972); *see also Capellini v. McCabe Powers Body Co.,* 713 F.2d 1, 5 (2d Cir. 1983) ("decisive consideration in assessing the sufficiency of . . . evidence of causation is the 'relative probability' of 'possible explanations' for the accident, and the 'legal inferences that can most reasonably be drawn from the most probable ones' "). In libel cases, for example, recklessness causing harm may be demonstrated by cumulative inferences. *See Goldwater v. Ginzburg,* 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970).

We do not hold that as a matter of law the evidence in this case required the jury to agree with the plausibility of a theory that Pan Am and Alert's misconduct was so reckless it must have caused the bomb to go undetected. We say only that under the Warsaw Convention wilful misconduct causing an accident may be established by inference from the totality of the circumstances. *Accord In re Korean Air Lines Disaster of September 1, 1983,* 932 F.2d 1475, 1481 (D.C. Cir.) (sufficient evidence existed "from which to decipher a pattern of conduct giving rise to liability"), *cert. denied,* 112 S. Ct. 616 (1991).

This conclusion does not mean that any of the burden of proving causation was lifted from plaintiffs. It remained plaintiffs' duty to prove causation under whatever theory they pursued. In this connection, the district court carefully instructed the jury that it must find not only wilful misconduct, but also a causal connection between that misconduct and the passengers' deaths. [Tr. 6558-59] Chief Judge Platt added that defendants' conduct would not be proximate cause of the accident if the accident would have occurred anyway, absent defendants'

acts or omissions. [TR 6561] Since the evidence introduced by the plaintiffs related to such a showing of causation, there was no error in its receipt.

B. *Evidence Challenging Plaintiffs' Causation Theory*

Various attempts by appellants to suggest other specific causation theories were then rebuffed by the trial court. Pan Am and Alert challenge the exclusion of the testimony of four defense witnesses: two offered as experts on terrorism, Noel Koch and Dr. Ariel Merari, and two offered as experts on terrorist bombings, Peter Gurney and John Horne of Scotland Yard. Pan Am also contends it was error to restrict its cross-examination of plaintiffs' experts, Billie Vincent and Rodney Wallis (the former Director of Security for the International Air Transport Association) with respect to other methods of bombing. The trial judge based his rulings largely on the fact that he found appellants had offered nothing to show there was any other specific bombing theory.

The admission or exclusion of expert testimony rests soundly in the broad discretion of the trial court. Fed. R. Evid. 702; *Hamling v. United States,* 418 U.S. 87, 108 (1974); *United States v. Gigante,* 729 F.2d 78, 83 n.2 (2d Cir.), *cert. denied,* 467 U.S. 1206 (1984). That court may, in its discretion, refuse to entertain expert testimony it thinks unhelpful, cumulative, confusing to the jury, or more prejudicial than probative. *See* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 702[02], at 702-18 to -20 (1993). Expert testimony as to causation may be excluded, particularly where it is speculative and conjectural. *See Washington v. Armstrong World Indus., Inc.,* 839 F.2d 1121, 1123-24 (5th Cir. 1988) (court within discretion excluding expert's testimony where expert never examined plaintiff but relied on other expert's examinations and such testimony as to cause of death was "pure speculation"); *Hull v. Merck & Co., Inc.,* 758 F.2d 1474, 1477-78 (11th Cir. 1985)

(trial court did not abuse discretion in excluding medical expert's deposition as to cause of plaintiff's disease because assumptions made seemingly firm opinion speculative and irrelevant); *Atlantic Mut. Ins. Co. v. Lavino Shipping Co.*, 441 F.2d 473, 475 (3d Cir. 1971); *cf. Novak v. United States,* 865 F.2d 718, 722 (6th Cir. 1989) (error to rely on expert's speculation to find causation); *Jones v. Goodlove,* 334 F.2d 90, 94 (8th Cir. 1964) ("[A] trial court may abuse its discretion by allowing a seemingly qualified expert to exceed the permissible bounds of opinion testimony and enter into the realm of utter speculation and conjecture.").

The trial court did not abuse its discretion in excluding the testimony of defense experts Koch and Merari because their conclusions as to more likely explanations for the bombing were speculative. Any testimony as to some other particular method of bombing—without any foundation that such method might explain the Flight 103 bombing—was clearly conjectural. To give point to the ruling that the proffered proof was speculative, Dr. Merari admitted that he did not know how the bombing was accomplished. [JA 3498]

Further, appellants admit in their brief that they "did not undertake to prove what method the terrorists used to bomb the aircraft . . . [but] contended that the method of bombing has not yet been established." *See* Appellants Br. at 49 n.59. Because there was no evidence presented with respect to other possible methods of causation that might explain how this tragic event occurred, and because appellants never sought to show that any other specific method of bombing could have caused it, any testimony relating to such other causes would necessarily be speculative. Although Dr. Merari and Noel Koch would also have provided general background information on terrorism, the determination whether or not this testimony would have been helpful to the jury rested squarely within the trial court's discretion. *See* Fed. R. Evid. 702.

Discretion was also properly exercised in limiting appellants' cross-examination of plaintiffs' experts to scenarios that had evidentiary support in the record. Cross-examination of plaintiffs' experts as to other causation theories—absent a good-faith basis to believe those theories had evidentiary support—was properly excluded. [Tr. 328; JA 2840-43, 4170] Trial courts possess wide discretion in limiting cross-examination, *see N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp.*, 590 F.2d 415, 421 (2d Cir. 1978), and here the precluded questions could have drawn the jury into misleading conjecture. Pan Am and Alert were permitted lengthy cross-examination of plaintiffs' experts, and were only barred from suggesting, without basis, that other scenarios caused the bombing.

It was also not error to decline to receive the testimony of terrorist bombings experts Peter Gurney and John Horne. Their testimony as to the importance of x-rays would have been cumulative since similar testimony was adduced from other witnesses. Additionally, these witnesses' expertise as to x-rays was questionable. Both witnesses were explosives officers with Scotland Yard who specialized in street bombings. [JA 4418-30] Neither had experience in aviation bombings or security. Moreover, neither had any background or knowledge concerning the Flight 103 bombing itself; [JA 4438-39] the trial court found this rendered their proposed testimony unhelpful and largely irrelevant. [JA 4444] This ruling was well within the trial court's Fed. R. Evid. 702 discretion.

Contrary to appellants' suggestions throughout their briefs, Pan Am and Alert were not thereby prevented from presenting a defense on causation. Pan Am and Alert's summation focused at length and in detail on criticizing plaintiffs' causation theory; this remained Pan Am and Alert's main theme throughout cross-examination and their defense case as well. They vigorously attacked major and minor pieces of evidence alike. They were

permitted to argue the possibility that a "rush-tag" bag, one by definition sent by the airline apart from its owner, was the unexplained, unaccompanied 13th interline bag x-rayed by operator Kurt Maier in Frankfurt. [Tr. 6472-73] Importantly, appellants did not offer any fact witness to testify as to another method of bombing that might have caused Flight 103's crash.

Appellants admit that at trial they sought to argue that the method of bombing was not established and concede they were unable to suggest a specific alternate theory. They vigorously argued that the method of bombing was unclear, and accomplished this through extensive cross-examination of plaintiffs' experts. Pan Am and Alert also were not deterred from attacking plaintiffs' weaker theory that widespread misconduct on defendants part more likely than not caused the bomb to be loaded on Flight 103. In sum, Pan Am and Alert exercised the ample opportunities given them to undermine plaintiffs' causation theory. Thus, the rulings limiting cross-examination and expert testimony were unremarkable and without error.

III OTHER EVIDENTIARY RULINGS

While appellants raise an array of objections to other evidentiary rulings—some of which patently involved judgment calls by the trial judge—none of them amount to reversible error.

A. *Plaintiffs' Experts' Testimony*

Appellants' first objection is to the testimony of plaintiffs' expert witnesses, Rodney Wallis and Billie Vincent. Wallis and Vincent gave their opinions relying on evidence adduced at trial, at times displaying for purposes of reference trial transcripts on a projection screen. Based on this testimony, for example, Wallis opined that Pan Am was operating under a commercial rather than security priority and that training requirements had been violated.

[JA 2689-90] Vincent stated—again based on other record testimony—that Pan Am had committed acts that violated ACSSP XV C.1.(a). [JA 2860].

Pan Am insists the Wallis and Vincent testimony involved improper summaries of evidence. But the cases relied on for support are inapposite because they do not address experts' summarizing record evidence, but rather they address summaries of evidence of the sort covered under Fed. R. Evid. 1006. *See, e.g., Fagiola v. National Gypsum Co. AC & S., Inc.*, 906 F.2d 53, 56-57 (2d Cir. 1990); *United States v. Conlin*, 551 F.2d 534, 538-39 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977). Rule 1006 provides in part, "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." It is of some significance that neither Wallis nor Vincent was giving the type of summary testimony that appears on a chart or graph.

The trial judge, therefore, properly ruled on the summary testimony under the federal rules governing expert testimony rather than under Rule 1006. Under those rules, expert testimony may be based on other testimony or evidence obtained at trial. *See* Fed. R. Evid. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."). No error occurred from the format of testimony summarizing the trial record or from the use of transparencies to high-light portions of the trial transcripts to which the witnesses referred when they were on the witness stand.

Wallis' and Vincent's summaries of testimony in the record did not, as appellants assert, improperly impinge on the jury's functions. Pan Am avers that in assessing other witnesses' testimony, Wallis and Vincent made credibility judgments that are properly reserved to the jury. They rely for this contention on *United States v. Scop*, 846 F.2d 135, 142, *modified*, 856 F.2d 5 (2d Cir. 1988).

There, it was said *in dicta* that one witness may not offer an opinion based on his or her assessment of the accuracy of another witness, where that other witness' credibility is to be determined by the trier of fact. *Id.* Even were *Scop*'s discussion of this point binding on us—and it is not—*Scop* does not in any event, control the outcome of the present case.

Wallis' and Vincent's testimonies were not improper simply because they were based on the testimony of others. Precedent has long acknowledged the acceptability of expert testimony based on the trial record. *See, e.g., United States v. Johnson*, 319 U.S. 503, 519-20 (1943). No doubt remains under the federal rules that an expert may testify based on facts elicited at trial. *See* Fed. R. Evid. 703. The rules also provide, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). The credibility of a witness represents just such an ultimate issue normally decided by the jury.

Nor are we troubled by Vincent's testimony that he thought appellants engaged in "fraud" and "deceit," because it was clear from the content of his direct and cross-examination that he used those terms in a non-legal sense. [JA 2934, 2969, 2946-48] Neither do questions arise as to the propriety of testimony given by Wallis, because appellants highlight no specific statement by him containing a legal conclusion as to a specific ACSSP violation. Additionally, because Wallis had an extensive background in aviation security it was not an abuse of the trial court's discretion to permit him to testify regarding causation.

Pan Am's next contention has greater merit. It declares that plaintiffs' witnesses improperly offered legal opinions as to ACSSP violations. We agree that Vincent's statement as to his belief that Pan Am violated the ACSSP is dubious. [JA 2860] While an expert witness may testify

as to an ultimate fact issue the jury will decide, *see* Fed. R. Evid. 704, the general rule is that an expert may not testify as to what the law is, because such testimony would impinge on the trial court's function. *See FAA v. Landy*, 705 F.2d 624, 632 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983). Permitting an expert to give a legal conclusion may implicitly provide a legal standard to the jury. *See generally Hygh v. Jacobs*, 961 F.2d 359, 363-64 (2d Cir. 1992); 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 704[02], at 704-11 to 13 (1993). Thus, expert testimony expressing a legal conclusion should ordinarily be excluded because such testimony is not the way in which a legal standard should be communicated to the jury. Vincent's testimony that he had been lead to the conclusion "that Pan Am did indeed violate the ACSSP" [JA 2860] embodied a legal conclusion that crossed the fine line between a permissible conclusion as to an ultimate issue of fact and an impermissible legal conclusion.

Having said this much, we hasten to add that the introduction of Vincent's statement was not in our view a reversible error. First, defendants took no specific objection to this statement. By failing to object when the statement was made, the objection was waived. *See* Fed. R. Evid. 103(a)(1). Second, even had an objection been timely made, the error was harmless. *Cf. Hygh*, 961 F.2d at 364 (testimony on ultimate legal conclusion found harmless). Vincent's testimony directly conveyed to the jury that he was stating his own conclusion, it represented but a small portion of extensive testimony providing the basis for his opinion, and the trial judge instructed the jury that he was the ultimate judge of credibility and liability. Under the circumstances, this error—even had there been a proper objection raised—was harmless.

B. *Detective Constable Henderson's Testimony*

Scottish Detective Constable Derek Henderson provided deposition testimony as to his work in the Flight 103 investigation. He was assigned responsibility for matching certain bags—the ones that might have been placed in the flight container that was determined to have held the bag with the bomb—with passengers on the aircraft. Henderson prepared his report largely through compiling computerized records of bags. These computerized records had been set up to amass reports from passengers' and crew members' friends and relatives, and from evidence obtained at the scene of the crash.

Appellants object to the admission of the detective's testimony and his report. Based on his analysis of passenger records and information obtained from passengers' and crew members' friends and relatives, Henderson determined that the Samsonite bag containing the bomb was an unaccompanied bag from the Frankfurt flight. [see JA 2585-88, 2631] Defendants moved to exclude his reports as based on multiple layers of hearsay; Henderson had compiled his reports based upon other officers' reports of interviews they had conducted in this necessarily lengthy and involved investigation.

We believe the evidence was properly received under Fed. R. Evid. 803(8)(C), which provides an exception to the hearsay rule for reports of public agencies containing "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." *See also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) (upholding broad admissibility of facts in government reports, unless circumstances demonstrate lack of trustworthiness). The determination as to any lack of trustworthiness remains one properly left to the district court, *id.*, and its decision to admit a report under Fed. R. Evid. 803(8)(C) is one that we will uphold

absent a manifest error. *See Gentile v. County of Suffolk*, 926 F.2d 142, 151 (2d Cir. 1991).

Here there was no explicit finding of trustworthiness, but no such finding is required before an official report under Rule 803(8)(C) may be received. The plain language of the rule establishes general admissibility, unless a report is deemed to be untrustworthy. *See* Fed. R. Evid. 803(8) advisory committee's note; *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983). The district court carefully examined the report and did not make a finding of a lack of trustworthiness. Although the trial court did provide a detailed consideration of reliability concerns, [SA 163-65] it had no duty to state it found the report trustworthy.

In any event, adequate evidence demonstrates trustworthiness in the case at hand. The Advisory Committee's Note on Rule 803(8) suggests several factors to consider in determining trustworthiness: 1) timeliness of the investigation, 2) the investigator's skill or experience, 3) whether a hearing was held, and 4) possible bias or motivation problems in the report. *See* Fed. R. Evid. 803(8) advisory committee's note. The investigation was timely, Henderson was an experienced and skilled investigator, and no bias may be presumed in the Scottish investigation. We cannot say the trial court abused its discretion in entertaining the report, particularly given its cautionary instructions to the jury concerning the report. [JA at 2562-63, 2569, 2608.]

C. *X-Ray Demonstration of Radio-Cassette Player*

Pan Am and Alert also sought to include an x-ray demonstration as part of their defense to show how clearly a radio-cassette player would appear on the screen. Such a demonstration was ultimately ruled irrelevant, given plaintiffs' offer to stipulate that a radio-cassette player would be visible on an x-ray screen. [JA 3331-34] Pan Am and Alert nevertheless declare the demonstration

would have generally supported Pan Am x-ray operator Kurt Maier's testimony that he x-rayed all the interline bags transferred to Flight 103 in Frankfurt.

The x-ray demonstration would not have either shaken or bolstered Maier's testimony since he said he could not remember whether any radios or cassette players appeared in any of the bags on Flight 103. [See SA 19-20; JA 3419-21.] More important, because plaintiffs stipulated that a radio cassette player would be clearly recognizable in an x-ray image the proffered demonstration would have been cumulative, and therefore inadmissible in the district court's discretion under Fed. R. Evid. 403. When a fact is undisputed and conceded, evidence attempted to be introduced to prove such fact may be excluded. *See United States v. Edwards*, 631 F.2d 1049, 1051, *aff'd*, 633 F.2d 207 (2d Cir. 1980). Although some cases have upheld the admission of proof respecting a conceded fact, the decision whether or not to do so is a matter that rests within the discretion of the trial court. *See, e.g., United States v. Gantzer*, 810 F.2d 349, 351 (2d Cir. 1987).

IV DAMAGES FOR LOSS OF SOCIETY AND COMPANIONSHIP

Pan Am and Alert's last claims of error concern the damage awards. In each of the three cases whose damages phases were tried the jury was permitted to award compensatory damages based on the loss of deceased passengers' society and companionship. [e.g., SA 150] The trial court also ruled that damages for the loss of parental care could be awarded to adult children of crash victims. [SA 149] Appellants disagree with both rulings.

As we noted in *Lockerbie I*, damages in a Warsaw Convention case are governed by federal common law principles consistent with the Convention's terms. *Lockerbie I*, 928 F.2d at 1278-79. Article 17 of the con-

vention provides for recovery of compensatory damages. *See* Warsaw Convention, art. 17; *Lockerbie I,* 928 F.2d at 1280-81. The first damages question to be analyzed is whether compensatory damages under the Convention include damages for loss of society and companionship.

Appellants' analogy to cases interpreting federal statutes and holding that loss of society damages may not be awarded is misplaced. Those cases are limited by the specific statutes construed. The statute interpreted in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978), for instance, the Death on the High Seas Act, explicitly limited damages to "pecuniary losses." *See id.* at 620, 623. Likewise, the Supreme Court's decision precluding loss of society damages in Jones Act cases is based on the statute. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 31-32 (1990). Although the Jones Act did not state that it covered only pecuniary losses, the statute applied to seamen substantive recovery provisions of the older Federal Employer's Liability Act (FELA). *Id.* at 32. Since FELA had been long construed to cover only pecuniary loss, *see Michigan Cent. R.R. Co. v. Vreeland,* 227 U.S. 59, 68 (1913), the Supreme Court said Congress must have planned for the same limitations to apply to pecuniary losses when it passed the Jones Act. *See Apex Marine Corp.,* 498 U.S. at 32.

Because those cases speak only to the specific federal statutes they interpreted, they provide but meager guidance in the instant case. This is particularly so given that in other federal cases—for example, those involving general federal maritime causes of action of longshoremen injured or killed in territorial waters—dependents may recover for loss of society. *See American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 280-81 (1980); *Sea-Land Servs., Inc. v. Gaudet,* 414 U.S. 573, 585-88 (1974). Our decision must be bottomed on the provisions of the Warsaw Convention.

Analyzing Article 17 of the Convention, we look first to its text. The Warsaw Convention has to be evaluated by examining the governing text as drafted in French. *See Eastern Airlines, Inc. v. Floyd,* 111 S. Ct. 1489, 1493 (1991); *Air France v. Saks,* 470 U.S. 392, 399 (1985). The English language translation of Article 17 simply provides, in relevant part, "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger . . . ." The original text of Article 17 provides for compensation for "dommage survenu;" the accepted English language translation of this phrase is "damage sustained." *See* Warsaw Convention, art. 17; 49 U.S.C. § 1502 app. note (1988). No limit to the types of damage appears in the text. The aim of the Convention's drafters and signatories appears from the simple language of the text to provide full compensatory damages for any injuries or death covered by the Convention. *See In Re Korean Air Lines Disaster,* 932 F.2d at 1486-7; *Lockerbie I,* 928 F.2d at 1281.

While our sources from which to determine the signatories' intent is limited, scholarly treatises on the subject agree that the French civil law recognized all sorts of damages, pecuniary and nonpecuniary. *See In re Korean Air Lines Disaster,* 932 F.2d at 1487 (citing G. Miller, *Liability in International Air Transport* 112 (1977) and R. Mankiewicz, *The Liability Regimes of the International Air Carrier* 157 (1981)). We encountered no understanding in French law that might support limiting "dommage survenu" to exclude loss of society awards.

Further, federal common law principles allow for loss of society and companionship recoveries in a variety of circumstances. From this we may infer that no principles of American law would necessarily argue against permitting loss of society damages under the Warsaw Convention. For instance, in *Gaudet,* 414 U.S. at 583-88, the Supreme Court applied general federal maritime common law and allowed damages for loss of society for the

death of a longshoreman killed in territorial waters. Again, courts have also allowed damages for loss of society and companionship in federal cases brought under the civil rights laws by fashioning federal common law remedies. *See, e.g., Berry v. City of Muskogee, Okla.*, 900 F.2d 1489, 1506-07 (10th Cir. 1990); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1251-53 (7th Cir. 1984).

Generally, when such awards are not permitted, it is because the statute under which they are sought forbids them, not because a general principle of federal common law precludes such damages. *See, e.g., Higginbotham*, 436 U.S. 618. In light of the broad language in the Warsaw Convention covering "damage sustained" and the lack of authority suggesting that the drafters wanted to limit compensatory damages, we hold the Warsaw Convention permits damage awards for loss of society and companionship. *Accord In re Korean Air Lines Disaster of September 1, 1983*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993); *In re Korean Air Lines Disaster of September 1, 1983*, 807 F. Supp. 1073, 1086-88 (S.D.N.Y. 1992).

Damages for lost parental care for children over 18 are likewise permitted. Precedent in other areas rejects bright-line age limits on compensatory damages. *See, e.g., McKee v. Colt Electronics Co., Inc.*, 849 F.2d 46, 51 (2d Cir. 1988) (allowing adult children to recover for lost nurturance, care and guidance suffered as a result of parent's death in New York wrongful death case); *Bell*, 746 F.2d at 1245 (age of deceased adult child not bar to parent's recovery for loss of society and companionship). No design may be seen in the Warsaw Convention to limit damages suffered by children strictly based on their ages. The district court properly left to the jury whether older children suffered a lesser loss and deserved decreased compensation. [SA 149]

CONCLUSION

The record of this trial is not a paradigm of a perfect trial. The critical question though is whether the trial was fair. Here we are satisfied upon an examination of the entire record that defendants received a fair trial. Accordingly, we affirm the jury verdicts both as to liability and as to damages.

The judgments of the district court are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1280, 1281, 1282—August Term 1992

(Argued May 19, 1993 Decided January 31, 1994)

Dissent Filed February 18, 1994

Docket Nos. 92-9251, 92-9253, 92-9255

IN RE: AIR DISASTER AT LOCKERBIE SCOTLAND ON DECEMBER 21, 1988.

JUDITH A. PAGNUCCO, Individually and as Executrix of the Estate of Robert I. Pagnucco, deceased; MOLENA A. PORTER, Individually and as Administratrix of the Estate of WALTER L. PORTER, deceased and DONA BARDELLI BAINBRIDGE, Individually and as Administratrix of the Estate of Harry M. Bainbridge,

Plaintiffs-Appellees,

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., and ALERT MANAGEMENT SYSTEMS, INC.,

Defendants-Appellants.

Before:

VAN GRAAFEILAND, CARDAMONE and ALTIMARI,

Circuit Judges.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

Writing a dissenting opinion in the instant case is not a pleasant task. My name will be anathema to the hundreds of people who are seeking recoveries probably in excess of $1 billion, and my long-time friendship with Judge Platt may suffer some stress. However, because I am convinced that Pam Am [1] did not receive a fair trial, I would be shirking my duties as a judge if I did not say so.

At one point near the end of the trial, Pan Am's counsel said to the court:

> Now, Judge, I would tell you, on a scale of 1 to 10, doing what I want in this courtroom, I have been about a minus 2, or maybe imaginary numbers would be a better way to describe as the level to which I have gone.

TR 5104.

I have read the record dispassionately, and I completely agree with this observation. Plaintiffs' attorneys were permitted to range far and wide with prejudicial, irrelevant testimony, while Pan Am's counsel was precluded time and again from presenting relative and probative proof. Because I recognize that evidentiary rulings are largely discretionary and because I want to follow the somewhat unusual practice, at least for me, of quoting at length from the record, I will limit my discussion to what I deem the major reversible errors.

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[1] The dissent will hereinafter refer to defendants Pan American World Airways, Inc. and Alert Management Systems, Inc. as Pan Am or defendant.

CONFLICT OF OPINION

At the outset, I want to state one clear and uncontrovertible fact: NO ONE KNOWS WHEN, WHERE OR HOW THE BOMB GOT ON THE PAN AM PLANE EXCEPT THE PERSON WHO PUT IT THERE.

The jury had to content itself with "expert" testimony, more properly described as educated guesses. My colleagues summarize the plaintiffs' proof as follows:

> Under plaintiffs' *theory*—detailed by several expert witnesses—the bomb was hidden inside a radio-cassette player packed in a bronze Samsonite suitcase. The suitcase *supposedly* traveled from Malta to Frankfurt on Air Malta Flight 180. There, the experts *posited*, it was transferred to the first leg of Flight 103 from Frankfurt to London, where it was then placed on Flight 103 bound for New York.

Slip op. at 7429 (emphasis supplied.)

The accuracy of the supposition that a suitcase carrying the bomb was sent unaccompanied from Malta to Frankfurt, was transferred there to a Pan Am plane in which it was flown to London, where it was transferred to the plane in which it subsequently exploded, was a crucial issue in the case, because plaintiffs' theory of liability was based upon Pan Am's allegedly deficient baggage checks during the two transfers. If there were no transfers, there could not have been any wilfully deficient screenings. The district court permitted plaintiffs' experts to testify in support of the supposition but precluded any testimony by defendant's experts in opposition thereto. Having read the testimony of Pan Am's experts that the district court kept from the jury, I am convinced that had the jury been permitted to hear this evidence, there is a strong likelihood it would have rejected plaintiffs' contention that the bomb which exploded began its deadly journey in Malta.

The jurors who had suffered through the same experiences that many of us have, with missed planes and lost luggage during connecting airline flights, probably wondered how presumably clever and experienced terrorists reasonably could have expected an unaccompanied bag containing a bomb to travel from Malta to Frankfurt to London, through two sets of baggage checks, to be smuggled finally aboard Pan Am Flight 103 and explode only after the plane had left London. The jurors' willingness to accept the plaintiffs' theory undoubtedly would be influenced in large measure by what Pan Am's witnesses said.

The first refutation of plaintiffs' supposition came from Wilferd Borg, the general manager of ground operations for Air Malta, one of the few witnesses produced by defendant whose testimony was admitted:

> Q Let me show you what we have marked as Exhibits HF-1 through HF-15 in evidence. (Handing.)
>
> A Thank you.
>
> Q Looking at those exhibits, Mr. Borg, have you ever seen them before?
>
> A Yes, I did.
>
> Q Would you tell the ladies and gentlemen what those documents are, the whole package?
>
> A That is the flight file or the ship's papers for Flight KM-180, destined to Frankfurt in Germany on the 21st of December 1988.
>
> Q When did you first see this particular flight file?
>
> A I saw this flight file, the first time, in February '89.
>
> Q What were the circumstances under which you saw the flight file at that time?
>
> A Our office in Germany had received a request from the German police requesting us whether we

had any passengers or baggage connecting to Pan American flights out of Frankfurt.

They said they were investigating this, they wanted this information in view of the Lockerbie incident in December, '88.

Q And what did you do with respect to their request?

A The request was passed along to me by our office in Germany.

I requested the manager responsible to keep these records, to give me this relevant flight file. I went through it and gave the relevant replies to the German police.

Q What were those replies?

A We had no passengers connecting on the flights out of Frankfurt.

We had no baggage destined to go in flights out of Frankfurt.

And, we had no unaccompanied luggage on that flight.

TR 5991-92.

Q. Now, sir, based upon everything that you've read and all the investigation that you did, are you able to tell this jury whether or not there was an unaccompanied bag on Flight 180?

A. No, there was no such bag.

Q. Were there any bags destined for Pan Am, any Pan Am flights?

A. No, there are no bags.

Q. Any passengers destined for any Pan Am flights?

MR. BAUMEISTER: Objection, leading.

THE COURT: Sustained. [???]

TR 6041.

The following testimony of Dr. Ariel Merari of Tel Aviv University, an expert on terrorism and bombing, also would have shed unfavorable light on the Malta-origin "theory." However, this testimony was kept from the jury.

Q. Do you think, sir, that it is conjectural how the bomb got on board?

A. Could you please rephrase the question.

Q. Do you know how the bomb got on board?

A. No, I don't.

Q. Do you think any, based upon the readings you have done in this record, a fair-minded, honest, so-called expert, with a reasonable degree of professional certainty, could opine how the bomb got on board?

. . .

A. Well, of what I have read, including the trial transcripts, I cannot see how anybody can say with any degree of certainty how the bomb got on board.

Q. Do you have any level of familiarity with what our government has been saying with respect to the indictments of two Libyans?

A. Yes, I do.

Q. And have you had, to the extent you can discuss this in this forum, a conversation with any representatives of security or secret services of any governments on that subject?

A. Yes.

Q. Has whatever knowledge that has come to you through those discussions in any way changed your

view that an honest and reasonable chap cannot say to a reasonable degree of professional certainty how this bomb got on board?

A. No. I still feel that I don't know how the bomb got on board and I don't think that at this particular stage, before more intelligence information comes in, which may be a long time after the incident, in some cases, I still feel that I don't know how the bomb got on board and I don't think anybody knows for sure or even in any degree of reasonable certainty how the bomb got on board at this time, except for the terrorists, of course.

TR 6259-60.

Q. Is it possible that a bomb was smuggled on board Pan Am 103 by an unwitting courier?

A. I think it is.

Q. Has that possibility been widely discussed secretly in the intelligence community?

A. Yes, it has.

TR 6258.

Even stronger refutation of the Malta theory was given by Peter Gurney, a Scotland Yards bomb expert, whose testimony also was kept from the jury:

Q. Let me ask you this: Do you have an opinion based upon your review of the data made available to you of the existence of the fire system that existed in that Neus Toshiba bomb B 453 radio cassette?

. . .

A. I do have an opinion.

Q. What is it?

A. I cannot see how such a device could have been used on a multi leg journey with one of the earlier

> legs being of longer duration than the flight on which the explosion took place.

TR 4582.

> Q. If you were a bomb designer wanting to blow up Pan Am 103 over the Atlantic Ocean on [sic] off the coast of the United Kingdom would you use the Air Malta routing suggested in this case?
>
> A. I'm not a bomb designer. We often have to think like terrorist [sic] in order to combat them. I would think that that was very unlikely because air travel—there are many delays in air travel. Normally on the ground. So to work up the exact timing to get the thing to go off when you want it and not have it go off on the ground could be extremely difficult. This is used in a straightforward timer, sir.

TR 4588.

Finally, the defense made an unsuccessful offer of proof of testimony by Noel Koch, a security consultant for the United States Department of Defense. If Koch had been permitted to testify on the subject, he would have said that the Air Malta theory is "widely at variance with *modus operandi* of Middle Eastern Terrorists attacks and specifically attacks on United States airlines," and that the "Air-Malta theory involves far too many variables to jibe with usual *modus operandi.*" He also would have testified that the Pentagon relies on x-rays to scan baggage.

Admittedly, a district judge has wide discretion in determining whether to admit evidence. However, this discretion "may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue." *United States v. Sellers,* 566 F.2d 884, 886 (4th Cir. 1977). *See also Breidor v. Sears, Roebuck & Co.,* 722 F.2d 1134, 1141 (3d Cir. 1983). "Rule 403

requires even-handedness." *Goldberg v. National Life Ins. Co.*, 774 F.2d 559, 565 (2d Cir. 1985) (citing *Sellers* and *Breidor, supra*); *see also United States v. Onumonu*, 967 F.2d 782, 788-89 (2d Cir. 1992). The district judge's lack of even-handedness cannot be justified by his reliance on the indictment of two unapprehended, unquestioned and unapproachable Middle Eastern terrorists:

> THE COURT: And I must view the evidence that we're talking about in that light, not in the light of a criminal case, because we're not in a criminal case.
>
> MR. CODDINGTON: Exactly. And my submission to you is that you may not give any evidentiary weight to the fact of that indictment.
>
> THE COURT: No, But I may give evidentiary weight, probable cause weight to the fact that a grand jury has returned the indictment. Not in a criminal case, but in the civil case, for purposes of, I may not so instruct the jury, but as a qualifier from my standpoint, I may give it that weight. In fact I must.

TR 6187.

Because the house of cards to the effect that the bomb entered the stream of commerce in Malta was constructed entirely of opinion testimony introduced by plaintiffs, simple justice required that defendant's experts be given an opportunity to demolish it. "[T]he admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988). Denial of this "ultimate safeguard" in the instant case was prejudicial reversible error.

SUBJECTIVE VERSUS OBJECTIVE WILFULNESS

As this Court held on a prior appeal in the instant case, we are dealing here with a civil action in tort. *See* 928 F.2d 1267, 1279 (2d Cir.), *cert. denied,* 112 S. Ct. 331 (1991). Under the Warsaw Convention as amended, Pan Am could not limit its liability to $75,000 if the damages claimed herein were caused by its wilful misconduct. We have defined "wilful misconduct" as used in the Convention on a number of occasions:

> Thus, plaintiffs needed to show that TWA omitted to do an act (1) with knowledge that the omission of that act probably would result in damage or injury, or (2) in a manner that implied a reckless disregard of the probable consequences.

Ospina v. Trans World Airlines, Inc., 975 F.2d 35, 37 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 1944 (1993).

> Willful misconduct requires either "the intentional performance of an act with knowledge that the performance of that act will probably result in injury" or "the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences."

Republic Nat'l Bank v. Eastern Airlines, Inc., 815 F.2d 232, 238-39 (2d Cir. 1987).

> There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.

Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 537 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966). (Citations in each definition omitted.)

We also have said that the mere violation of air safety rules and regulations, even if intentional, would not necessarily constitute wilful misconduct. *Berner v. British Commonwealth Pacific Airlines, Ltd., supra,* 346 F.2d at

537; *see also Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1162-63 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). The district court charged the jury in the instant case that "the violation of FAA regulations and safety standards . . . would not necessarily constitute willful misconduct." TR 6557. However, because of the district court's erroneous exclusions of evidence, this portion of its charge became meaningless. The district judge treated this case as if Pan Am were being prosecuted for criminally violating a federal regulation and, relying on his erroneous interpretation of criminal law, precluded every attempt by Pan Am to demonstrate that it did not know or believe that the probable result of its conduct would be injury to the plaintiffs.

> THE COURT: This whole thing starts at page 65 and it goes right on through to page 78 and it leads up to the very question we have been discussing now for days, namely, the FAA, the alleged FAA verbal authorization.
>
> I don't see what this has got to do with the price of beans, what his understanding of the ACSSP procedures are. He's not in court here. The regulations speak for themselves.
>
> I don't see what basis this comes in under anyplace.
>
> MR. SHAUGHNESSY: Your Honor, this is a willful misconduct case.
>
> THE COURT: I know it's a willful misconduct case, but willful misconduct is not excused by Sonesen's version of an oral permission which is not admissible in the FAA. It is not admissible. And that's all this is.
>
> MR. SHAUGHNESSY: I don't think that's all that this section is, your Honor.

First of all, Mr. Pounian has only objected to three questions on page 65. I don't know where else he intended to.

MR. POUNIAN: I had further objections, your Honor.

MR. SHAUGHNESSY: Based upon his, quote/unquote, understanding.

THE COURT: If his understanding is all based upon the conversations with Sonesen then his understanding of what the ACSSP regulations meant is not relevant.

Mr. Sonesen's unilateral verbal permission here, as I have said now for the 425th time is not in this case.

TR 3958-59.

Everyone who boards an airplane justifiably believes that guns, bombs and other dangerous devices will be detected by x-ray screening and barred from the flight. That, obviously, is what Pan Am believed, and Pan Am wanted to show that it was encouraged in this belief by assurances from Raymond Salazar, Director of the Federal Aviation Administrations Office of Civil Aviation Security, that x-ray inspection of interline baggage would satisfy FAA requirements. Plaintiffs' attorney knew from pretrial depositions that testimony to this effect would be given by Daniel Sonesen, Pan Am's Assistant Director for Security, and the attorney determined to meet this testimony head on. He did this by offering in evidence in his affirmative case an E-mail message from Sonesen to Pan Am's airport security officers, which read in part as follows:

PER MESSAGE OF 10 MAR-88 ANSWER: FAA R SALIZAR HAS GRANTED X-RAY AS AND [sic] (alternate to searching Pass.)

Following this piece of evidence, plaintiffs' counsel offered the following testimony of Salazar:

Question: This document is something more than that, doesn't it, sir? It says that you granted x-ray as an alternative doesn't it?

Answer: Yes, that is what the document says.

Question: You just said to me that you never granted that to Mr. Sonesen?

Answer: That's correct, I did not.

Question: You had never even spoken to Mr. Sonesen, did you?

Answer: About this issue, I have no specific recollection of speaking to Mr. Sonesen about this issue.

Question: Therefore, sir, if you didn't grant permission to Mr. Sonesen, and he said in this document you did, isn't that a lie?

Answer: It is an improper interpretation.

Question: It is an improper interpretation. I am not talking interpretation now of the procedures, I am talking about the statement: R. Salazar granted.

Is that statement accurate?

Answer: No, it is false.

Question: So that statement, as it goes, R. Salazar has granted, is a lie.

A VOICE: Objection.

Answer: Again, it is only what—I can say it is here. It is a misrepresentation. It is not an accurate depiction of the requirements for air carriers operating out of those stations.

Question: Can we agree that when Mr. Sonesen said that you had granted, in this phrase, that that was a falsehood?

Answer: That was a falsehood.

TR 1279-80.

On the basis of Salazar's testimony, the district judge made a colossal blunder by a *sua sponte* ruling that was so contrary to established legal precedent and simple justice that it smacked of a due process violation—he declared that he would receive no testimony from Sonesen or any other Pan Am employee in support of Sonesen's assertion of what Salazar had told him. Sonesen, whose testimony was an important part of Pan Am's defense, was branded a liar, and the district court precluded Pan Am from attempting to prove that he was not. So far as the jury knew, a substantial part of Pan Am's defense was built upon a lie, or as plaintiffs' counsel described it in summation, "a concocted piece of baloney." TR at 6395.

A trial is not a "game of blindman's buff." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). It is a "search for the truth." 8 Wright and Miller, *Federal Practice and Procedure* § 2001 at 14. That search will succeed only if the trial court recognizes the right of each party to present its evidence and to rebut that of his opponent, a right that "is a fundamental element of due process of law." *See Washington v. Texas*, 388 U.S. 14, 19 (1967). It is a rule as old as the proverbial hills that when a party opens a subject in its case in chief, his opponent is entitled to offer evidence on the same subject, i.e., to explain, repel, counteract or disprove the evidence that the party introduced. *See, e.g., United States v. Touloumis*, 771 F.2d 235, 241 (7th Cir. 1985); *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975); *United States v. Mallis*, 467 F.2d 567, 569 (3d

Cir. 1972); *Luttrell v. United States,* 320 F.2d 462, 464 (5th Cir. 1963); 1 *Wigmore on Evidence* § 15 at 740.

Indeed, evidence that otherwise might be inadmissible may be admitted when it is needed to remove an unfair prejudice that might result from its rejection. *See, e.g., Harris v. New York,* 401 U.S. 222, 225-26 (1971); *Walder v. United States,* 347 U.S. 62, 64-65 (1954); *United States v. Gubelman,* 571 F.2d 1252, 1254 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978); *United States v. Benedetto,* 571 F.2d 1246, 1250 (2d Cir. 1978). " 'Where a defendant in his direct testimony falsely states a specific fact, "the prosecution will not be prevented from proving, either through cross-examination or by calling its own witnesses, that he lied *as to that fact.*" ' " *United States v. Keilly,* 445 F.2d 1285, 1289 (2d Cir. 1971), *cert. denied,* 406 U.S. 962 (1972) (citations omitted); *see also United States v. Nathan,* 476 F.2d 456, 460 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973); *United States v. Cuadrado,* 413 F.2d 633, 635 (2d Cir. 1969), *cert. denied,* 397 U.S. 980 (1970); *United States v. Colletti,* 245 F.2d 781, 782 (2d Cir.), *cert. denied,* 355 U.S. 874 (1957). *See also* Fed. R. Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

Now, to lay to rest any argument that the district judge was not fully aware of what Pan Am intended to prove in response to Salazar's testimony, I quote from the trial testimony:

> THE COURT:
>
> As I understood, your position is somebody in the FAA, I don't know who, told Sonesen or somebody in Pan Am verbally once they had the x-ray machine they didn't have to physically search a couple of bags.
>
> MR. SHAUGHNESSY: That's correct.

THE COURT: That is your position.

MR. SHAUGHNESSY: I understand.

THE COURT: I won't allow that offhand remark in when I have no basis for it at the moment.

MR. SHAUGHNESSY: What I propose to do is end my examination at this point and raise the question as part of my direct case.

THE COURT: Based on what I know I won't let that in.

TR 1138-39.

THE COURT:

Mr. Sonesen's testimony was, as I recall it, and it's right here before us, Sonesen's testimony was that I got this verbal permission from Salazar, we discussed it up and down the hierarchy which would include these discussions here right up to what's his name.

TR 3960.

MR. SHAUGHNESSY: Your Honor, what Salazar and Billie Vincent said was that Salazar had the authority, he just couldn't do it orally.

THE COURT: Salazar had the authority, but there has been nothing produced in writing and Sonesen said he got it orally and he acted on it orally and he told all of these people that he had the authority from the FAA and it's irrelevant what he told people in the Pan American organization on this subject, because he didn't have the authority.

It's like my saying to you that I have the authority to go over and remove the money from the Chase Manahattan Bank. You know I don't, and you can't go and say gee, whiz, I'll go spend that sum of money that he promised me from the whole because

you know that it's ill-gotten gains and you know that it's that simple.

MR. SHAUGHNESSY: No, it's not.

THE COURT: Yes, it is.

MR. SHAUGHNESSY: No, it's not. This is not a statute that's being violated. This is not even a regulation that is being violated.

This is a rule promulgated under the regulation that is being violated.

THE COURT: It doesn't make any difference. According to the very rule, that cannot be altered or modified except in writing.

And you're charged with that knowledge and all of these people are charged with that knowledge and they never did have any writing.

MR. SHAUGHNESSY: So I take it that all of the conversations among these people are out?

THE COURT: Obviously they're not objecting to it, but I'm going to sustain those three questions that he's objected to and I'm going to—you might as well know now that I'm going to sustain the questions and answer on page 78.

MR. SHAUGHNESSY: I understand, your Honor.

THE COURT: And anything else that they object to in between I'm going to sustain because I think it's irrelevant.

TR 3961-62.

My colleague's statement, slip op. at 7440, that the trial judge suggested the making of an offer of proof concerning Sonesen's testimony, is completely without support in the record. Sonesen's testimony had been taken prior to the trial and it was before the court. Plaintiffs' counsel read the portions of Sonesen's testimony that he

deemed favorable but omitted, with the district court's acquiescence, that portion which covered Sonesen's alleged conversation with Salazar. There was no uncertainty concerning Sonesen's testimony; it was there to be read. The testimony concerning proffer that is quoted in the majority opinion took place during the testimony of Thomas Plaskett, Pan Am's Chairman, not Sonesen. My colleagues fail to include in their quote at 7440 the following response of Pan Am's counsel that immediately followed the district judge's suggestion:

> MR. CODDINGTON: May I finish with him and let the other side finish with them and then make a little record afterwards as not to interrupt it?

TR 3637.

My colleagues also neglect to point out that, before Coddington finished his examination of Plaskett, he made the offer of proof as suggested by the district court. The following excerpts are taken from that offer:

> THE COURT: I think, ladies and gentlemen, we must take a little testimony outside your presence, and so I'm going to ask you to go next door and not to discuss the case. I don't know for how long this will be.
>
> (The jurors leave the courtroom at 12:10 p.m.)
>
> (Outside the presence of the jury.)
>
> MR. CODDINGTON: This is kind of unusual, Mr. Plaskett. We are making—may I explain—what the lawyers call an offer of proof for His Honor outside the presence of the jury. From your standpoint, this is just the same as if they were here. I will ask questions and give you your answers under oath.
>
> THE WITNESS: Okay.
>
> . . .

Q Was Pan Am ever cited by the FAA for a violation for using x-rays in Frankfurt or London, to your knowledge?

A No, sir, not to my knowledge.

. . .

[Q] During the period January 1988 to December 21, 1988, when you were in control, to your knowledge was Pan Am ever cited by the government for what, using x-rays, was that the question? For using the x-rays?

THE WITNESS: No, sir, not to my knowledge.

. . .

[Q] During the time that lapsed between your arrival and December 21st of 1988, did you have any conversations with anybody, or did it in any fashion—

THE COURT: No, take it single. Don't double the question.

Did you have any conversation within your organization?

BY MR. CODDINGTON:

Q Concerning using x-rays at these two airports?

A Not that I recall.

Q Did it come to you—did you have information from any source at all during that time concerning the depravity of using x-rays?

A Not that I recall.

Q After Lockerbie, have you had any conversations or received any information on that subject?

. . .

A Yes, sir.

Q And what was your understanding derived as a result—

THE COURT: Wait a moment. Take it step-by-step.

With whom did you have any such conversation and when and so forth.

BY MR. CODDINGTON:

Q With whom and when and so forth?

THE COURT: No, one step at a time.

With whom did you have the first such conversation after Lockerbie?

You want me to conduct this for you?

MR. CODDINGTON: Sure, Judge, I appreciate it.

BY MR. CODDINGTON:

Q You may answer the Judge's question.

A I believe it was Mr. Cunningham.

Q When did you have it?

A I don't recall the specific date.

THE COURT: Well, I'm not asking the date.

About when?

A Very early in 1989.

Q And what was the substance of the conversation?

THE COURT: What did he say to you?

THE WITNESS: I'm trying to recall.

I believe Mr. Cunningham told me that this subject had been discussed at numerous meetings with security personnel from airlines, that he had been working with the appropriate FAA security personnel, and that he believed that it was an acceptable alter-

native, although it was at that time not specifically so stated in the ACSSP.

MR. CODDINGTON: That was my offer, Judge. I submit it, your Honor.

TR 3642-48.

It is crystal clear from the record that no offer of proof concerning Sonesen's proposed testimony was required, and the record is completely devoid of any suggestion that a proffer of his testimony be made. My colleagues should not attempt to avoid responsibility for one error by creating other error.

I find equally erroneous my colleagues' contention, slip op. at 7443, that Pan Am waived its objection to the district judge's erroneous exclusion of evidence by refusing to accept the following "band-aid" offer of the district court made after two months of trial:

> On the so-called verbal authorization, I didn't think they would be able to come up with any cases. Of course, they haven't come up with any cases, which changes the law in this circuit.
>
> If they want me to give the jury an instruction to disregard the testimony that came in at the outset of the case before I understood what the issue was, I will be glad to give that instruction.
>
> But I rather suspect they don't want me to highlight it at this point. But if they want me to, I will be glad to tell them that they are to disregard any such conversations between Salizar [sic] and they are to draw no inference one way or the other from it because it is irrelevant to this case, and Sorenson. [sic] But it is not admissible.

TR 4787-88.

The suggested instruction that the jury disregard "any such conversations between Salizar and they are to draw

no inference one way or the other from it because it is irrelevant to this case," followed by the statement that Sonesen's testimony remains inadmissible, simply demonstrates the district court's misunderstanding of the law and deprives Pan Am of one of its major defenses, i.e., its lack of wilfulness. The undeniable fact is that the subjective proof of Sonesen's understanding was highly relevant, and Pan Am's counsel would be foolish to stipulate otherwise. Pan Am's counsel's refusal to leap at the court's suggestion demonstrates that he had a better understanding of the applicable law than the district court or my colleagues have demonstrated.

Time and again Pan Am's counsel explained his position to the district court, all to no avail:

> The meetings that are referred to there, testimony of Mr. Sonesen, I don't know whether Mr. Baumeister is going to read any of his deposition, was that there was a discussion at that meeting and that at that meeting Mr. Salazar said specifically that in connection with ICAO 514 and London Heathrow Airport in particular, that x-ray was a suitable alternative to the bag match.
>
> Now this is a willful misconduct case, your Honor, in which Mr. Sonesen, the plaintiffs are claiming they willfully disregarded this provision, 15C1(a). If the jury believes mr. [sic] Salazar that in fact the discussion was limited to ICAO 514, they still could believe that Mr. Sonesen, based on the meeting and what was discussed, could have believed, legitimately believed, that x-ray was a suitable alternative and that Mr. Salazar had said that.
>
> This is a willful case, your Honor.

TR 7294-95.

The district judge never budged from his misunderstanding of the law:

THE COURT:

The proposition before us is that Sonesen says—Sonesen not being Pan Am corporation, about whom we are talking, but only an employye [sic] of Pan Am. Sonesen says he got verbal permission from Salazar. The cases are quite clear, that that is inadmissible under the issue of lawfulness or otherwise, and I have never seen anything at the moment, recently, that casts any doubt on it.

TR 3375-76.

THE COURT: Ever heard the expression, an individual may not bind the government?

MR. CODDINGTON: Ever heard the expression that an individual may not bind the government? Yes, I have.

THE COURT: The government enacted a regulation or promulgated a regulation, I may not take off my robe, I may not work until executive capacity authorizes to make that. United States against Sorenson [sic] regulates, while on this subject, said: Whoever had the authorization from the DIA and C.I.A. to smuggle guns to Russia, and so forth and so on, and the 2d. Circuit upheld, may not do that verbally. That's the law.

This theory of yours, if you have verbal authorization from somebody to violate a regulation, I will have to charge the jury that an individual may not do that.

MR. CODDINGTON: Well, certainly I'm happy to brief that.

THE COURT: Brief it all you want, because I sweated blood over this issue, because this was really quite serious. This was the business of taking armaments from this country and swapping it over from Russia, all on the okay of D.I.A. and C.I.A., And I

wouldn't let them put that defense before the jury, and the 2d. Circuit said I was right. I went through a tremendous amount of research and wrote an opinion on this, and it was published, *United States -vs-Schwartz*. You may not as an individual authorize somebody to do something against the regulation, whether you are high-ranking. I don't think the President may do it. I didn't have to decide.

TR 3219-20.

THE COURT: In any event, nobody approved this in writing.

So the whole defense is a non-entity.

I know you don't want to get rid of it from your mind, but there it is. If you want to stop the trial and mandamus me to the Second Circuit and have your ears pinned back, fine.

But that's it, that's the ruling, you've got to live with it. You've got to stop trying to sneak it in through the back door or I'm going to have to take appropriate action.

TR 3965.

THE COURT:

You might have some validity to it if—if there was any kind of an acknowledgement from Salazar that he—that he had any such conversation, but he emphatically denies it.

Everybody says it is not within anybody's power to give it or—and the regulation itself says you've got to have any modification in writing.

It just doesn't make any sense to me that anybody in his right mind would rely—would, in fact did rely on any such permission. It just didn't exist.

TR 4789.

The cases of *United States v. Duggan,* 743 F.2d 59 (2d Cir. 1984), *United States v. Schwartz,* 924 F.2d 410 (2d Cir. 1991) and *United States v. Berg,* 658 F. Supp. 253 (E.D.N.Y. 1987), *aff'd in part by Schwartz, supra,* stand for the general proposition that a criminal act cannot be justified by mistaken reliance on purported authority to perform it. Where wilfulness and wrongful intent are not a statutory requisite, this may be so. However, it is not an *ipso facto* rule that applies in every criminal case. *See United States v. Laub,* 385 U.S. 475, 487 (1967) ("Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach."); *see also United States v. Pennsylvania Indus. Chem. Corp.,* 411 U.S. 655, 675 (1973); *Cox v. Louisiana,* 379 U.S. 559, 571 (1965); *Raley v. Ohio,* 360 U.S. 423, 438 (1959); *Johnson v. United States,* 318 U.S. 189, 199 (1943).

My colleagues rely upon the phrase "ignorance of the law is no excuse" as if it were completely determinative of the issues herein. However, the maxim "a man is presumed to know the law," is by no means universally true. *National Conversion Corp. v. Cedar Bldg. Corp.,* 23 N.Y.2d 621, 628 (1969) (quoting *Municipal Metallic Bed Mfg. Corp. v. Dobbs,* 253 N.Y. 313, 317 (1930)). *See also Ratzlaf v. United States,* 114 S. Ct. 655, 659-60 (1994); *Woodling v. Garrett Corp.,* 813 F.2d 543, 552 (2d Cir. 1987); *Restatement (Second) of Torts* § 545.

My colleagues, I suggest, also err in their interpretation of *Cheek v. United States,* 498 U.S. 192 (1991), to the effect that the holding therein applies only to tax cases. *Cheek* stands for the general proposition that "the standard for the statutory willfulness requirement is the 'voluntary intentional violation of a known legal duty.' " *Id.* at 201 (citations omitted). It also holds, in four-square opposition to the holding of my colleagues herein that, a good-faith belief that one is not violating the law, if it is to negate wilfulness, need not be objectively reasonable.

Wilfulness is a question of fact for the jury. *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983). *See also Morissette v. United States*, 342 U.S. 246, 274 (1952) (citing *Spies v. United States*, 315 U.S. 492, 500 (1943)); *United States v. North*, 910 F.2d 843, 885-86 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991). A trial judge cannot take the question from the jury and answer it himself by applying his own objective standard of wilfulness. This is the clear holding of *Cheek*:

> We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it. It would of course be proper to exclude evidence having no relevance or probative value with respect to willfulness; but it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.

498 U.S. at 203.

My colleagues clearly err, therefore, in holding that "an absence of wilful misconduct—when based on a claim of a mistaken understanding of [FAA] regulations—must be supported by objectively reasonable evidence as to that mistaken understanding." Slip op. at 7449. In *Ratzlaf v. United States*, *supra*, the Supreme Court interpreted the language of 31 U.S.C. § 5322, which forbids a person

from wilfully violating the antistructuring provisions of sections 5322(a) and 5324. Justice Ginsburg, writing for a five-judge majority, said: "To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 657; *see also id.* at 663 n.19.

Justice Ginsburg cited with approval, *id.* at 660, this Court's opinion in *United States v. Dichne,* 612 F.2d 632, 636 (2d Cir. 1979), *cert. denied,* 445 U.S. 928 (1980), where we held that to establish a violation of 31 U.S.C. § 1101 (now § 5316), the Government must prove a defendant's " 'knowledge of the reporting requirement and his specific intent to commit the crime.' " In *Vinieris v. Byzantine Maritime Corp.,* 731 F.2d 1061 (2d Cir. 1984), the question presented was whether the failure of a ship's captain to pay a seaman's wages as required by 46 U.S.C. § 596 was arbitrary and wilful. We there held:

> Because these are the crucial issues in the instant case, the trial court should have followed a liberal policy in admitting evidence directed towards establishing the Captain's subjective state of mind. No evidence which bore even remotely on this issue should have been kept from the jury, unless it interjected tangential and confusing elements which clearly outweighed its relevancy. *United States v. Brandt,* 196 F.2d 653, 657 (2d Cir. 1952); *United States v. Foshee,* 578 F.2d 629, 632-33 (5th Cir. 1978); *Coleman v. United States,* 167 F.2d 837, 840 (5th Cir. 1948). Of course, testimony by the Captain as to his beliefs, motives, and intent was material and admissible. *United States v. Kyle,* 257 F.2d 559, 563 (2d Cir. 1958), *cert. denied,* 358 U.S. 927, 79 S. Ct. 312, 3 L.Ed.2d 301 (1959); *United States v. Hayes,* 477 F.2d 868, 873 (10th Cir. 1973).

Id. at 1064.

This was not a novel holding; it was a statemetnt of established law. *See United States v. Brandt,* 196 F.2d 653, 657 (2d Cir. 1952):

> Culpable intent or lack of good faith is not merely an element of the crime of fraudulent use of the mails; it is in fact practically crucial where as here the scheme and the mailing are admitted. And hence, since it may be only inferentially proven, 2 Wigmore on Evidence §§ 300, 302, 3d Ed. 1940, no events or actions which bear even remotely on its probability should be withdrawn from the jury unless the tangential and confusing elements interjected by such evidence clearly outweigh any relevancy it might have.

(Citations omitted). *See also United States v. Foshee,* 578 F.2d 629, 632-33 (5th Cir. 1978), *cert. denied,* 444 U.S. 1082 (1980).

We would be blinking reality if we did not hold that the district judge's erroneous rulings were prejudicial. Indeed, as disclosed by the following excerpt from the argument on appeal, plaintiffs' counsel admitted as much:

> JUDGE VAN GRAAFEILAND: Let me ask you this, Mr. Kreindler: If I read the record, I listen to your argument and I read the record, and I decide that Judge Platt said I'm not going to hear from Mr. Sonesen no matter what, would you concede that that is very prejudicial error in this case?
>
> MR. KREINDLER: Under those circumstances, yes. But that's not what happened. That's—
>
> JUDGE VAN GRAAFEILAND: I'm not asking you that. I'm asking you if I read this record and I decide that that is what happend—leave this offer of proof business out—if I decide that Judge Platt just simply said, I'm not going to hear Mr. Sonesen, that would be prejudicial error; wouldn't it, in this case?

MR. KREINDLER: Your Honor, even—

JUDGE VAN GRAAFEILAND: Counsel, wouldn't it be prejudicial error?

MR. KREINDLER: Of course, if the judge were hearing—

JUDGE VAN GRAAFEILAND: Of course, it would. Then we have got the issue: did he refuse to hear him, or didn't he?

MR. KREINDLER: No.

JUDGE VAN GRAAFEILAND: All right, that's the issue. I'll read the record very carefully, Mr. Kreindler.

Moreover, the district judge himself recognized the crucial importance of Sonesen's testimony when he said, "You're in trouble if this is your defense." TR at 3356.

In view of the definitive holding of the Supreme Court in *Cheek, supra,* that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law need not be objectively reasonable in order to negate wilfulness, the district court's ruling for the "425th time" that Salazar's verbal permission was "not in the case," TR 3959, was clearly and prejudicially erroneous. My colleague's statement that Sonesen's reliance upon Salazar's comments "must be supported by objectively reasonable evidence" is clearly and prejudically wrong.

Even my colleagues concede that the district court erred in excluding evidence of British Airway regulations which, in the face of bombings by Irish terrorists organizations, permitted Pan Am and other carriers to x-ray unaccompanied baggage at Heathrow Airport. This proof, my colleagues recognize, "undercut[s] the allegation that [Pan Am] consciously or recklessly disregarded the probable consequences of its x-ray procedures" and "clearly was relevant." Slip op. at 7451. My colleagues continue,

"[a] showing that Pan Am and Alert complied with British security directives—whether or not they violated the ACSSP—might have made it somewhat less likely to believe that they acted recklessly in adopting an x-ray-only approach to inspecting interline bags." Slip op. at 7452. I regret that in my colleagues' apparent eagerness to affirm, they hold this error to be harmless. It was not harmless. It went squarely to a crucial issue in the case, i.e., whether Pan Am knew that its use of x-ray screening probably would result in injury.

Evidence that, shortly after the Lockerbie accident the FAA amended its regulations so as to permit x-ray screening, also went squarely to the issue of whether Pan Am should have anticipated danger in its pre-amendment use of x-rays. The district court's refusal to permit the jury to receive this evidence exacerbated all of the court's similar rulings that pervaded the trial. In short, it was another indication that the district court misunderstood the law. The issue was not whether Pan Am violated the regulation; it was whether Pan Am wilfully used x-ray screening with knowledge that its use would probably result in injury or in reckless disregard of the probable consequences.

DAMAGES

Because I am convinced that this case should be retried on the merits, I am reluctant to detract in any way from the strength of my argument by discussing the issue of damages. However, because there are over two hundred other actions pending in which damages will play a major role, I would be remiss if I did not express my concern over the cursory treatment given by my colleagues to the question of loss of society.

When this Court held in *Benjamins v. British European Airways,* 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 1114 (1979), that the Warsaw Convention created a cause of action, the dissent predicted that reference to the federal common law would be required in order to

supply the elements missing in the Convention. *Id.* at 922. Article 17 of the Convention provides that a carrier shall be liable "for damage sustained" in the death of a passenger. Article 24 provides that an action under Article 17 can only be brought subject to the conditions and limits set out in the Convention but that these provisions shall apply "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." Since *Benjamins* was decided, the courts consistently have held that reference must be had to other federal statutes to answer the question raised by Article 24. *See, e.g., Harris v. Polskie Linie Lotnicze,* 820 F.2d 1000, 1002 (9th Cir. 1987); *In re Mexico City Aircrash,* 708 F.2d 400, 415 (9th Cir. 1983); *In re Aircrash Disaster at Malaga,* 611 F. Supp. 903, 904 (E.D. N.Y. 1985). Indeed, the author of the present majority opinion squarely so held on a prior appeal in the instant case:

> Commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention; *See Harris,* 820 F.2d at 1002 ("Evidently damages are to be measured according to the internal law of a party to the Convention"); *Mertens,* 341 F.2d at 858 ("It seems clear that the Warsaw Convention left [the issue of which items of damage can be properly included in the award—e.g. mental anguish], as it did other issues, such as who are the proper beneficiaries of a damage award, to the internal law of the parties to the Convention."); Miller, *Liability in International Air Transport* at 117; Drion, *Limitation of Liabilities* at 125-26; N. Matte, *Treatise on Air-Aeronautical Law* 383 (1981).
>
> . . .
>
> The Final CITEJA Report drafted by the official Reporter for the Convention, Henri deVos, stated

> The question was asked of knowing if one could determine who are the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independently from the present Convention.

928 F.2d at 1283-84 (citation omitted).

Maritime law, which to a large extent is "judge made," *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 259 (1979), is the most fertile source of federal common law. *See Sample v. Johnson,* 771 F.2d 1335, 1345 (9th Cir. 1985), *cert. denied,* 475 U.S. 1019 (1986). Because prior to *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970), general maritime law denied any recovery for wrongful death, it did not specify which dependents were entitled to recovery and what their ultimate recovery should be. *Id.* at 406. After *Moragne* permitted such recovery, courts adopted the practice of looking to analogous statutes, *Mexico City Aircrash, supra,* and currently prevailing views, *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 284 (1980). Maritime law thus became an amalgam of traditional common law rules, modifications of those rules and newly created rules. *East River Steamship Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 864-65 (1986). There is little principled reason, therefore, why the rules thus established for recovery of maritime damages should not be looked to for guidance in Article 17 Warsaw Convention cases.

There is little question that, if we were to apply the teachings of the Death on the High Seas Act, 46 U.S.C. §§ 761-68, the Jones Act, 46 U.S.C. App. § 688, or the general maritime law, there would be no loss of society recovery by anyone. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 31-33 (1990); *Wahlstrom v. Kawasaki*

Heavy Indus., Ltd., 4 F.3d 1084, 1091-93 (2d Cir. 1993). Pan Am's attorneys ask us to follow that lead in the instant case. However, because a spouse's right to recover damages for loss of consortium, which incorporates loss of society, is broadly recognized, if I were the sole judge of a spouse's right of recovery under the Warsaw Convention, I would hold that it should be permitted. *See American Export Lines, supra,* 446 U.S. at 281; *but see Harris, supra,* 820 F.2d at 1005; *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151, 1152-55 (S.D. Fla. 1992).

Recovery by other relatives of the deceased presents much more of a problem. *See Miles v. Melrose,* 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp., supra,* 498 U.S. 19 (1990):

> The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman—aunts and uncles, nieces and nephews, even friends and lovers—necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk,* the line between dependents and nondependents, "appears to be the most rational, efficient and fair." It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependents.

Because of the ramifications that would result from allowing loss of society recoveries by individuals other than spouses, the tendency has been to either deny such recovery or limit it to surviving dependents. *See DeLoach v. Companhia De Navegacao Lloyd Brasileiro,* 782 F.2d 438, 441-43 (3d Cir. 1986); *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455, 459-60 (5th Cir. 1985), *cert. denied,* 475 U.S. 1019 (1986); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 770-72 (W.D. Mich. 1988),

aff'd in part, rev'd in part and remanded, 894 F.2d 804 (6th Cir. 1990); *Matter of Complaint of DFDS Seaways (Bahamas) Ltd.,* 684 F. Supp. 1160, 1164 (S.D.N.Y. 1987); *Truehart v. Blandon,* 672 F. Supp. 929, 938 (E.D. La. 1987), *rev'd on other grounds,* 884 F.2d 223 (5th Cir. 1989).

As a sole dissenting judge, I would not presume to say what the proper rule should be concerning non-spouses. However, because my colleague's statement that "the Warsaw Convention permits damage awards for loss of society and companionship," slip op. at 7472, is limited to neither spouses nor dependents, I suggest that its overbreadth will cause both controversy and confusion in future cases.

CONCLUSION

If all of the irrelevant and prejudicial evidence dealing with such matters as television commercials and the private lives of Pan Am employees, together with the colloquies of court and counsel arising out of the district court's "425" erroneous rulings, were eliminated from this case, it could be retried in several weeks. Particularly in view of the fact that the outcome in over two hundred cases hinges upon the judgment in the instant case, justice demands that the matter be remanded so that it can be tried fairly.

I dissent.

APPENDIX H

UNITED STATES DISTRICT COURT
E.D. NEW YORK

M.D.L. No. 799 (TCP)
Nos. 89-CV-0387 (TCP), 89-CV-0386
(TCP) and 89-CV-0337 (TCP)

IN RE AIR DISASTER AT LOCKERBIE, SCOTLAND
ON DECEMBER 21, 1988

JUDITH A. PAGNUCCO, Individually and as Executrix
of the Estate of Robert I. Pagnucco, deceased,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
PAN AM WORLD SERVICES, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Defendants.

DONA BARDELLI BAINBRIDGE, Individually and as
Administratrix of the Estate of
Harry M. Bainbridge, deceased,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
PAN AM WORLD SERVICES, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Defendants.

MOLENA A. PORTER, Individually and as Administratrix of the Estate of Walter Leonard Porter, deceased,
Plaintiffs,

v.

PAN AMERICAN WORLD AIRWAYS, INC., PAN AM WORLD SERVICES, INC., and ALERT MANAGEMENT SYSTEMS, INC.,
Defendants.

Nov. 2, 1992

MEMORANDUM AND ORDER

PLATT, Chief Judge.

Defendant Alert Management Systems, Inc. ("Alert"), by counsel, has moved this Court for an Order granting judgment as a matter of law as to it pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is denied.

BACKGROUND

On December 21, 1988, Pan Am Flight 103 crashed near Lockerbie, Scotland; all 243 passengers and 16 crew members died. The surviving relatives and personal representatives of those who died sued Pan American World Airways, Inc., Pan Am World Services, Inc., and Alert Management Systems, Inc. (collectively "defendants"). On April 4, 1989, the Judicial Panel on Mulitidistrict Litigation consolidated all actions and transferred them to this Court. *See In re Air Disaster at Lockerbie, Scotland on December 21, 1988,* 709 F.Supp. 231 (Jud. Pan.Mult.Lit.1989).

Over a period of 11 weeks in the spring and summer of 1992, a jury trial was conducted in the passenger actions to determine if defendants had engaged in wilful misconduct that was the proximate cause of the disaster.[1] At the close of plaintiffs' case and again at the close of all the evidence, defendant Alert moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Alert argued that plaintiffs had not offered sufficient evidence to allow a reasonable jury to conclude that Alert engaged in wilful misconduct that proximately caused the accident. This Court reserved judgment on Alert's latter motion and submitted the action to the jury. On July 10, 1992, the jury returned a verdict in favor of plaintiffs finding "Pan Am (including Alert)" had engaged in wilful misconduct and that such wilful misconduct was "a substantial factor in causing the disaster." Jury Verdict Form.

Alert now renews its motion for judgment as a matter of law pursuant to Rule 50(b), incorporating by reference its original written motion.[2]

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[1] The liability of carriers is limited to $75,000 per passenger under Article 22 of the Warsaw Convention as supplemented by the 1966 Montreal Agreement. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. 876 (1934), *reprinted at* note following 49 U.S.C.App. § 1502 (Warsaw Convention); Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, note following 49 U.S.C.App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) (Montreal Agreement). If, however, plaintiffs prove wilful misconduct, then the liability limits are inapplicable (Article 25).

[2] Alert renews its motion against three plaintiffs only—Pagnucco, Bainbridge, and Porter—because as of this date, damage trials have been held and judgments have been entered for these plaintiffs only.

DISCUSSION

This Court is convinced that Alert is not entitled to judgment as a matter of law because Alert concededly is a wholly owned subsidiary of Pan Am created to be responsible for conducting all security measures and procedures,[3] and contrary to Alert's contention, defense counsel made it abundantly clear to the jury that it was not to distinguish between the liability of Pan Am and Alert. Furthermore, plaintiffs presented substantial evidence at trial such that a reasonable jury would almost certainly have concluded that Alert, by itself, was also guilty of wilful misconduct that proximately caused the disaster.

A. Defense counsel treated Pan Am and Alert as a single entity.

Alert contends that as "agent of Pan American World Airways . . . Alert's state of mind must be judged separately from Pan Am in determining whether Alert was guilty of 'wilful misconduct' that caused the disaster." Memorandum of Defendant Alert in Support of Renewed Motion for Judgment as a Matter of Law (hereinafter "Memorandum in Support") at 3. However, a statement of defense counsel for both Pan Am and Alert at the opening of trial belies this contention. Defense counsel told the jury to treat Pan Am and Alert as "one":

> Now technically these are two separate companies. *Quite frankly, for your purposes, you can consider them one.* We created Alert to help with the security, and as far as we're concerned and you should be concerned, I'm going to talk from now on about Pan Am, but Pan Am is responsible for Alert as it is for its own force.

(Tr. 64) (emphasis added).

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[3] *See* Opening Statement of Clinton H. Coddington (Tr. 64) ("Now, about this same time in 1986 Pan Am created this company called Alert Management Systems. It was owned as part of Pan Am's corporate family and was wholly owned by a sister company called Pan Am World Services.").

The jury, this Court, and plaintiffs were entitled throughout the trial to rely upon this representation and admission by counsel. Counsel may not have it both ways. He may not claim Alert and Pan Am are one and then, once the verdict is in, attempt to withdraw from this agreement and admission.

Alert argues that in this passage from counsel's opening statement, he was merely informing the jury of "the normal rules of agency law . . . under which a principal is responsible for the wrongdoing of its agent." Reply Memorandum of Defendant Alert in Support of Renewed Motion for Judgment as a Matter of Law (hereinafter "Reply Memorandum") at 3. But if counsel was so concerned about treating Alert and Pan Am separately, he should not have taken the extra step and told the jury (as he did) to treat them as one.

Furthermore, even if Alert and Pan Am should have been and were considered separately by the jury, this Court knows of no principle of agency law that relieves an agent from liability for its own misconduct, and as demonstrated below, the jury heard substantial evidence of Alert's wilful misconduct.

Additionally, Alert may not try to distinguish itself from Pan Am when the special verdict form presented to the jury considered the two defendants as one. The special verdict form contained two questions:

(1) Did Pan Am (including Alert) engage in wilful misconduct? Yes — No—.

(2) Was it a substantial factor in causing the disaster? Yes — No —.

The jury answered "Yes" to both of these questions. (Tr. 6711).

To be sure, at the charge conference on July 6, 1992, and again on July 7, defense counsel submitted to the Court a proposed special jury interrogatory that distin-

guished between Pan Am and Alert. (Tr. 6323-24, 6328, 6581-91). But after the jury returned its verdict on July 10, this Court invited counsel for defendants to submit a supplemental interrogatory, and counsel declined the Court's invitation. (Tr. 6581-91, 6713). Thus, Alert waived its right to obtain the determination it now seeks and may not now claim prejudice from the absence of a separate finding against it.

Finally, if Alert and Pan Am truly intended to be treated separately, then it makes no sense to this Court why the same law firm represented both, given the manifest conflict of interest between Alert and Pan Am on the issue of which "entity" was responsible for the Lockerbie disaster. Indeed, it would have been clearly improper for the same law firm to represent both defendants in these circumstances.

B. The facts support a finding of Alert's liability.

Even if we were to assume that the jury understood it was judging Alert's state of mind separately from Pan Am's, Alert still is not entitled to judgment as a matter of law because, given the following evidence that was presented at trial, a reasonable jury would almost certainly have concluded that Alert was guilty of wilful misconduct that proximately caused the disaster:[4]

1. Trial testimony established that Pan Am utilized x-ray machines to detect potential security risks, such as a bomb. (Tr. 3451). Moreover, all interline baggage for

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[4] Under the Warsaw Convention, to prove wilful misconduct, plaintiffs must show that Alert intentionally failed to perform some act that allowed a bomb to be placed on board "(1) with knowledge that the omission of that act probably would result in damage or injury, or (2) in a manner that implied a reckless disregard of the probable consequences." *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir.1992). *See also Republic Nat'l Bank of New York v. Eastern Airlines, Inc.*, 815 F.2d 232, 238-39 (2d Cir.1987).

Flight 103 was x-rayed. (Tr. 4744). Trial testimony also established that it was Alert's responsibility to operate the x-ray machines, such that Alert represented the last and only line of defense of Flight 103 against bags containing explosives. (Tr. 4744-45).

2. The jury listened to overwhelming evidence regarding Alert's failure to employ competently trained and well-informed personnel to operate the x-ray screeners. (Tr. 1802-22, 1421-24).[5] In particular, they heard evidence regarding the improper training of Kurt Maier, the Alert employee who was operating the x-ray machine in Frankfurt and who allegedly overlooked the radio cassette player containing the bomb. (Tr. 827). Mr. Maier himself testified that before his employment by Alert on November 1, 1988, he had no security experience, and that he received no training from Alert except "on the job" training over a period of two to four days, consisting of random assistance by other Alert employees. (Tr. 6115-16, 6143).[6] Mr. Maier testified further that al-

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[5] Alert attempts to evade this by arguing that plaintiffs' theory of causation focused on the decision to use x-ray procedures to inspect interline baggage in place of performing positive passenger-to-baggage matching and that the evidence showed that this decision was made by Pan Am, not by Alert. Memorandum in Support at 6. However, this argument does not suffice, for although the failure to perform passenger-baggage matching was a primary cause of the disaster, Alert's failure to employ competently trained and well-informed screeners also led to the disaster. A reasonable jury almost certainly would have found that proper x-ray screening, although inferior to passenger-baggage matching, would also have led to detection of the bomb.

[6] Alert argues that it was Pan Am, not Alert, that was to provide the training for Alert's x-ray operators, and therefore Alert cannot be held responsible for failing to train its own employees. Memorandum in Support at 7. The Court notes that at trial there was conflicting testimony about whether Pan Am or Alert was responsible for training Mr. Maier and other x-ray machine operators. What is clear, however, is that neither Alert nor Pan Am trained Mr. Maier and the other screeners. Thus, a reasonable

though he needed his glasses to discern fine detail, he was not wearing them while viewing objects through the x-ray machine on December 21, 1988. (Tr. 6108). Meanwhile, Anthony Cooke, an Alert employee in London, testified that Alert personnel should have had no difficulty recognizing on an x-ray screen a Toshiba radio cassette recorder, such as the one in which the bomb that destroyed Flight 103 was hidden. (Tr. 5231). In short, Alert, by reason of either Mr. Maier not being able to see clearly without his glasses, or not having been trained or advised to pull bags with Toshiba radios for physical inspection, was guilty of wilful misconduct that was a proximate cause of the accident.

3. Ulrich Franz Weber testified that Alert knowingly cooperated with Pan Am employees to disguise chronic understaffing and noncompliance with FAA regulations at Frankfurt whenever FAA inspections were expected so that they would not have to provide more security. (Tr. 1580-87).

4. The jury heard evidence that Alert's Frankfurt security director, Mr. Weber, received in early December a written warning from the FAA, known as the "Helsinki warning" that a bomb would be placed on board a Pan Am flight from Frankfurt to the United States, but that the only thing Weber did with the warning was place it on his desk, (Tr. 1350-63, 1378, 1389-90), and despite the warning, he never instructed personnel to examine all electronic devices that they observed through the x-ray process. (Tr. 6160). Moreover, several Alert employees, including Stella Schneider, testified that they watched as Weber backdated the Helsinki warning to suggest that it had been properly processed by Alert in Frankfurt. (Tr. 1350-63, 1378, 1389-90, 3146, 1416-21). Furthermore,

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jury could have concluded that both Pan Am and Alert breached their duty to provide properly trained personnel, and that Alert's wilful breach of that duty was a substantial contributing factor in the disaster.

Alert employees as high as the European director were advised of his backdating and attempted to conceal it. (Tr. 1350-58, 1361-63, 1378, 1389-90). This was evidence of consciousness of guilt on the part of Alert for its part in the wrongful causation of the crash.

5. Oliver Koch, an Alert employee who was responsible for advising personnel on how to respond to bomb threats, testified that had he seen the Helsinki warning before December 22, he would have increased personnel and tightened overall security. (Tr. 1377-82).

6. Mr. Koch testified further that in early November, 1988 he attended a presentation where German officials discussed how the Frankfurt police, during the arrest of suspected terrorists, discovered a Toshiba radio cassette player bomb designed to blow up an aircraft. (Tr. 1364-66). At the presentation, the officials distributed photographs of the device, together with warnings of a threat to civil aviation. (Tr. 1364-66). Mr. Koch stated further that he did not discuss the substance of the warning with anyone at Alert, other than Mr. Weber, and he did not alter procedures to address it. (Tr. 1375-78).

7. Two expert witnesses, Billie Vincent and Rodney Wallis, testified that Alert screeners should have been examining all electronic devices in light of the Toshiba warning. (Tr. 3123-24, 3451, 3480-81). Moreover, Mr. Wallis testified that even a lay person could easily detect a radio cassette player within baggage that passed through an x-ray machine. (Tr. 765, 810).

In sum, after hearing this evidence and its role in contributing to the accident, reasonable and fair minded jurors would almost certainly have concluded that Alert intentionally ignored the warnings "with knowledge that [failure to respond to the warnings] probably would result in damage or injury." *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir.1992).

CONCLUSION

Because counsel for Alert never explained to the jury that Alert's liability was to be judged separately from Pan Am's, and because the evidence against Alert on the issue of wilful misconduct that was a proximate cause of the accident was overwhelming, Alert's motion must be and the same hereby denied.

SO ORDERED.

Supreme Court, U.S.
FILED
DEC 27 1994
OFFICE OF THE CLERK

No. 94-952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,

Petitioners,

—v.—

JUDITH A. PAGNUCCO, DONA BARDELLI
BAINBRIDGE, MOLENA A. PORTER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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December 21, 1994

QUESTIONS PRESENTED

1. In a Warsaw Convention case, where the jury was properly charged, without objection, on the issues of both wilful misconduct and causation, on which there is no conflict among the circuits, did the district court commit any error in the admission or exclusion of evidence which so prejudiced the defendants as to require a new trial?

2. After a hard-fought trial lasting three months and a verdict for the plaintiffs on wilful misconduct and causation, does a careful, multi-layered, discussion of evidentiary questions by the court below, affirming the district court for several different reasons, with supporting evidence to show that even if there had been error it was harmless, constitute the resolution of disputed fact in deprivation of the right to jury trial?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

Proceedings Below 1

Facts 2

I. THE EXPLOSION AND THE INVESTIGATION 2

II. FAA SECURITY REGULATIONS 3

III. AMENDMENTS AND EXEMPTIONS TO THE ACSSP HAD TO BE IN WRITING 5

IV. WILFUL MISCONDUCT: PAN AM'S TOP MANAGEMENT DIRECTED A POLICY OF DECEPTION AND COST-CUTTING WHICH DESTROYED EFFECTIVE SECURITY 5

A. The "Alert" security program and surcharge 5

B. The appearance of security which didn't exist 6

C. Cutbacks on money for security 6

D. Abandonment of passenger baggage match for interline baggage 7

PAGE

E. Denial of vital information to its pilots and deceiving the FAA 8

V. PAN AM'S KNOWLEDGE OF THE PROBABLE CONSEQUENCES OF FAILURE TO PROVIDE EFFECTIVE SECURITY 9

A. The KPI Report 9

B. Abandonment of positive match would permit unaccompanied bags 10

C. Prior fatal bombings 10

D. Specific FAA warnings of impending bombings 10

VI. FLIGHT 103 REFLECTED THE GENERALIZED INADEQUATE SECURITY CREATED BY MANAGEMENT 12

VII. THE LOCKERBIE BOMB WAS IN AN UNACCOMPANIED INTERLINE BAG FROM AIR MALTA LOADED ON FLIGHT 103 IN FRANKFURT BECAUSE OF PAN AM'S FAILURE TO PERFORM A POSITIVE MATCH 14

VIII. DEFENDANTS' CASE 16

A. Defendants were given broad freedom to prove a case 16

B. Defendants' experts 17

C. Sonesen's "oral waiver" 17

PAGE

D. The proffer of U. K. "regulations" 22

IX. THE TRIAL COURT'S CHARGE TO THE JURY ON WILFUL MISCONDUCT AND CAUSATION..... 24

REASONS FOR DENYING THE WRIT..... 25

I. THERE IS NO CONFLICT BETWEEN CIRCUITS AND THE TRIAL COURT'S DISCRETIONARY RULINGS ON EVIDENCE WERE CORRECT... 26

A. There is no conflict between the court below and any other circuit regarding the definition of wilful misconduct and causation under the Warsaw treaty..... 26

B. The trial court's discretionary rulings on evidence were correct..... 27

1. The Government authorization defense 27

2. Defendants' pattern of misconduct in failing to provide mandated security was admissible..... 28

II. DISCUSSION IN THE MAJORITY OPINION DID NOT CONSTITUTE THE RESOLUTION OF DISPUTED FACTS IN DEROGATION OF THE RIGHT OF TRIAL BY JURY 30

CONCLUSION..... 30

APPENDIX..... 1a

TABLE OF AUTHORITIES

Cases: PAGE

Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) 29

In re Air Disaster at Lockerbie, 928 F.2d 1267 (2d Cir.), *cert denied*, 112 S.Ct. 351 (1991) 1

In re Korean Air Lines Disaster, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S.Ct. 616 (1991)... 27

Ismail v. Cohen, 899 F.2d 183 (2d Cir. 1990)..... 29

Jones v. Berry, 880 F.2d 670 (2d Cir. 1989) 28

Tug Ocean Prince v. United States, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979) 29

United States v. Brennan, 798 F.2d 581 (2d Cir. 1986) 29

United States v. Daly, 842 F.2d 1380 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988) 29

United States v. Diaz, 878 F.2d 608 (2d Cir.), *cert. denied*, 493 U.S. 993 (1989) 29

United States v. Smith, 727 F.2d 214 (2d Cir. 1984)... 29

Vinieris v. Byzantine Maritime Corp., 731 F.2d 1061 . 21

Statutes and Rules:

14 C.F.R. § 11.25(b)(5) 5, 28

14 C.F.R. § 11.27(e)..... 5, 28

14 C.F.R. § 108.25(b)(c) 5, 28

28 U.S.C. § 1404..... 1

28 U.S.C. § 1407..... 1

PAGE

49 U.S.C. § 1357(a)(2)(B) 5, 28

49 U.S.C. § 1421(a)(6)(c) 5, 28

Fed.R.Civ.P. 50 27

Fed.R. Evid. 403 21

Fed. R. Evid. 404(b) 29

Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note 1

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Pagnucco, Bainbridge, and Porter respectfully pray that the petition for a writ of certiorari filed in these cases on behalf of defendants be denied.[1]

STATEMENT OF THE CASE

Proceedings Below

Wrongful death actions against Pan American World Airways (Pan Am) and Alert Management Systems, Inc. (Alert) were commenced in various federal courts and transferred under 28 U.S.C. §§ 1404 and 1407 to the United States District Court for the Eastern District of New York before Chief Judge Thomas C. Platt, Jr. for a consolidated trial on liability.

There were extensive pretrial proceedings. The district court granted defendants' motion to bar punitive damages under the Warsaw Convention[2] and the court of appeals affirmed. *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir.), *cert denied*, 112 S.Ct. 351 (1991). Over 180 depositions were held in the United States, Germany, Scotland, England, Sweden, and Switzerland. The trial was postponed several times pending the release of key causation evidence from the criminal investigation.

The consolidated liability trial, binding on all passenger cases, commenced on April 27, 1992. Thirteen weeks later, the jury, which had heard testimony from 58 witnesses, rendered separate special verdict findings: that the defendants were guilty of wilful misconduct; and that the wilful misconduct was a proximate cause of the deaths (Tr. 6711; JA 1432). Defendants did not object to the court's charge on wilful misconduct and causation (JA 3726-3735; App.1a-3a).

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[1] Citation to the petition for certiorari will be to "Pet."; citation to the appendices to the petition will be to "Pet. App." Citation to the appendix to this brief will be to "App."

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

Three damages trials were then held resulting in verdicts of $9,225,000, $9,000,000, and $1,735,000 respectively. The jury reached a defense verdict on plaintiffs' claims for pain and suffering. Judgments were entered in the three actions. (JA 454-459).

Defendant Pan Am did not move for judgment as a matter of law under Fed.R.Civ.P. 50, their counsel conceding that plaintiffs had presented sufficient proof of wilful misconduct and causation.[3] Defendant Alert's motion for judgment as a matter of law was denied with a written opinion. (JA 460-472).

Defendants appealed to the court of appeals, which affirmed the judgments with a dissent (Pet. App. 96a). Defendants then petitioned for a rehearing with a suggestion for a rehearing in banc which was denied except to the extent stated in a revised majority opinion (Pet. App. 1a). Defendants again petitioned for rehearing with a suggestion for rehearing in banc, which was also denied. (Pet.App 89a).

Facts

I. THE EXPLOSION AND THE INVESTIGATION

On December 21, 1988, Pan Am Flight 103, a Boeing 747 flying at 31,000 feet from London to New York and Detroit, exploded over Lockerbie, Scotland. The explosion and resulting crash killed all 259 persons on board and 11 on the ground. (JA 615-16).

The destruction of Flight 103 gave rise to the world's largest murder investigation. The painstaking investigatory work performed by the FBI, Scotland Yard, Scottish police forces, the Royal Armament Research and Development

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[3] Pan Am's lead counsel stated:

> I never said they had no proof . . . . I didn't even ask for a judgment with respect to Pan Am because I think they have enough on that issue to go to the jury. I've never said they had no case. (JA 3450).

Establishment ("R.A.R.D.E."), the Air Accidents Investigation Branch ("A.A.I.B.") and German Police agencies determined that the Lockerbie bomb was contained in an unaccompanied suitcase transferred to Pan Am Flight 103 in Frankfurt from an inbound Air Malta flight.[4] This was corroborated by specific proof adduced by plaintiffs.[5]

II. FAA SECURITY REGULATIONS

In April 1986, faced with an extreme terrorist threat to U.S. commercial aviation, the FAA imposed extraordinary security procedures under Section XV of the Air Carrier Standard Security Program (ACSSP) at Frankfurt and London. (JA 4017-19, 4185-87). The ACSSP had the force of law, set a minimum standard (JA 4148-9, 4154),[6] and was incorporated in Pan Am's Security Manual (JA 3818, 3934-4047).

The first extraordinary security requirement was the passenger/bag match of Section XV C.1.(a), which required Pan Am to:

> Conduct a positive passenger/checked baggage match resulting in physical inspection or noncarriage of all unaccompanied bags. The carrier may use either physical match or administrative match, but, in either case, it should be done in a way that passengers are aware of the use of the procedures. (JA 4017).[7]

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[4] JA 581, 629, 682, 744, 716-17, 2388-89, 2396, 2400, 2405-06, 2579, 2581-84, 2588, 2591, 2631, 2632, SA 172-77; Tr. 1970-71; Tr. 2897, 2905-06.

[5] See Fn 18, *infra*.

[6] Because of its confidential and sensitive nature, the ACSSP was not included in the published Federal Air Regulations. Nevertheless, the ACSSP had the same status as an FAA regulation. A violation of an ACSSP provision was, therefore, a violation of the FARs and a violation of a regulation, including one in the ACSSP, constituted a violation of the Federal Aviation Act, Section 610(a)(5). (JA 4149).

[7] *Physical match* meant baggage would be placed on the tarmac for passengers to personally identify (JA 1713, 4190). *Administrative match* used a checklist, either by computer or manually, to ensure that all

The regulation imposed two separate and distinct requirements; first, Pan Am was to match *every* checked bag with a passenger who actually boarded. An unaccompanied suitcase could then be carried only if subjected to "physical inspection," which required that the bag be opened and the contents searched by hand.[8] (JA 4033-35; JA 3282, 3273, 1683)[9] (SA 209).

The ACSSP also required the airline to use a Ground Security Coordinator (GSC) who would ensure that all security requirements were met prior to flight departure, and advise

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bags were accompanied by an identified passenger (JA 1713, 4204-05). For interline bags, an administrative match required that the baggage tag numbers be compared with the bag tag numbers on the claim ticket of each interline passenger. (JA 557, 2674-5).

[8] Petitioner's contention (pet.7, Fn 8) that "physical inspection" could be done by x-ray is a misstatement since x-ray meets none of the definitions in ACSSP "Physical Inspection Guidelines", b and k, (JA 4033-35; JA 3283; JA 209-10; JA 4189). The ACSSP expressly required physical inspection of unaccompanied checked bags rather than x-ray inspection because physical inspection was a far more thorough and reliable method of detecting bombs. X-ray was permitted by another section of the ACSSP, VIII, at lower security airports where the terrorist threat was less (JA 3978, 4187) and for selectee's bags where the bag's owner was present for questioning (JA 4201-2, 4264-5).

[9] Petitioners mischaracterize the positive match procedure as "Pan Am's x-ray procedure" (Pet 6, 8); "its x-ray procedure" (Pet. 6); "its x-ray inspection" (Pet. 6); and "its use of x-ray" (Pet. 7,9). They attribute to plaintiffs a question they know is phoney, "whether Pan Am used x-ray screening with knowledge that its use would probably result in injury" (Pet. 9). And they purport to describe (at Pet. 5) *"Plaintiffs' Theory of Intentional Rule Violation"* as involving the "requirement that any unaccompanied bags be hand-searched, i.e. XV. C.1.(a) of the ACSSP."

This falsely states both the XV.C.1(a) requirement, and plaintiffs' case. Positive match required that all bags be matched to passengers, and if no passenger, then removal of the bag, and either noncarriage or physical search before being carried. It was a matching requirement followed by a physical search and certainly not an x-ray requirement. There was nothing wrong with using x-ray so long as it was not a *substitute* for positive match followed by physical search. What Pan Am did with respect to interline bags, which were the prime threat, was to *abandon* the positive

the pilot-in-command of "all pertinent security information", including the presence of unaccompanied bags; that certain passengers termed "selectees" face more stringent security checks (JA 4199-4201); that parked aircraft be under constant guard observation (JA 4018); that the airline train, test, and supervise all capable personnel to perform screening functions; and that security personnel were thoroughly familiar with all screening requirements (JA 4206, 4209).

III. AMENDMENTS AND EXEMPTIONS TO THE ACSSP HAD TO BE IN WRITING.

Federal regulations mandated that any amendments to or exemptions from the ACSSP required a written application by the airline and written approval by the FAA.[10] Any changes made had to promote "safety and the public interest". *Id.* Pan Am's Chairman testified that Pan Am never received written authorization from the FAA to substitute x-ray for passenger-baggage match.[11] (SA 198-203). The FAA had no authority to orally amend or waive an ACSSP regulation. (JA 2039, 4167-68). ACSSP XIV required that the FAA be notified in writing by the airline of any change in procedures or implementation procedures. (JA 4234-36).

IV. WILFUL MISCONDUCT: PAN AM'S TOP MANAGEMENT DIRECTED A POLICY OF DECEPTION AND COST-CUTTING WHICH DESTROYED EFFECTIVE SECURITY.

A. The "Alert" security program and surcharge

In May 1986 Pan Am announced its "Alert" security program enacted in response to a sharp decline in international

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match procedure entirely and simply put all interline bags through x-ray. It was the abandonment of positive match that "would probably result in injury" and not the use of x-ray.

[10] 14 C.F.R. §§ 11.25(b)(5), 11.27(e); 108.25(b)(c); 49 U.S.C. §§ 1357(a)(2)(B), 1421(a)(6)(c).

[11] Pan Am itself had repeatedly submitted written applications for ACSSP exemptions, including a March 1988 request (denied by the FAA) for "relief" from the Section XV requirements (including the passenger-

travel due to terrorist attacks. (JA 1550-51, JA 1562)). A widely published advertisement signed by Pan Am's Chairman of the Board and CEO announced that "Pan Am will initiate one of the most far-reaching security programs in our industry. A program that will screen passengers, employees, airport facilities, baggage and aircraft with unrelenting thoroughness." (JA 479, 1563). At the same time, Pan Am created a separate subsidiary corporation, Alert, to provide contract security services for its flights. (JA 1550).

As part of the Alert program, Pan Am imposed a security surcharge on international passengers ($5 one way or $10 round trip) to pay for the promised additional security measures. (JA 1581). The surcharge generated $18 million in annual revenues for Pan Am.[12] (JA 1581).

B. The appearance of security which didn't exist

The surcharge money received was commingled with general revenues and not earmarked for security. (JA 2993). Pan Am's Frankfurt and London Security Directors testified there was no more money for security and observed no differences in security before and after the surcharge (JA 1857; 1808).

Alert's first President, Fred Ford, was fired after writing a memo to Pan Am's senior executives complaining that the promised security program was not being put into effect and that "now people are beginning to ask: What do I get for my five dollar security surcharge?" (JA 1580-83). Ford testified that Pan Am knowingly paraded untrained dogs as a "bomb-sniffing" canine unit. (JA 1578).

C. Cutbacks on money for security

Pan Am repeatedly cut back on security to save money. It routinely refused to hire sufficient personnel and systematically failed to train, supervise and warn GSCs and screeners,

bag match) for German domestic flights. (Tr. Ex. 56; JA 730 (JA. 1043-44; 1050-62).

[12] Ninety seven passengers on Flight 103 paid the $5 or $10 surcharge. (Ex. 119; JA 754).

as the ACSSP required. (JA 562-63, 1511, 1852-3, 1874-5, 1878, 1954, 2193-2211, 2213, 2274).

In June 1988, Pan Am's management instructed Alert's Manager for Germany, Ulrich Weber, to sharply cut security expenses in Frankfurt and refused to fund necessary training of screeners. (JA 2192-97, 2207-08). Weber testified that Leuniger, the Pan Am Frankfurt station manager's attitude toward security was that it was "[a] waste of time" and should be "[k]ept to a minimum." (JA 2206).

In October 1988, Huebner, Pan Am's Security Director in Frankfurt, wrote to Pan Am's New York headquarters citing the need for more security personnel. (JA 562-63). After expressing his concern that "financial concerns were jeopardizing the lives and safety of Pan Am passengers" (JA 1902), Huebner was told by Pan Am management that "for financial reasons the security staff has to be kept to a minimum." (JA 563 1954).

D. Abandonment of the fundamental passenger baggage match for interline baggage.

Above all Pan Am violated the primary requirement of the extraordinary security requirement: the passenger/baggage match.

In April 1986, when the ACSSP extraordinary security regulations were first enacted, Pan Am established procedures in Frankfurt and London to match interline bags with the baggage claim check numbers of interline passengers who checked in at the gate. (JA 557, 3304). Unaccompanied bags received from other carriers were identified and not carried. (JA 1925)

Top management, however, viewed the interline bag match as "cumbersome" and "a problem" which caused delays and cost the airline money. (JA 1925, 1927, 3283-4, 3305).

As a result in late 1986 top management decided to discontinue the interline bag match at extraordinary security

stations, starting with Athens and Rome in 1986, followed by London in 1987 and Frankfurt in June 1988. (JA 2642-3, 3302).

Pan Am eliminated the threshold positive match process *entirely* for interline bags, and substituted a system where interline bags were x-rayed. (JA 974-75, 3275, 3302). This violated XV.C.(1)(a) in two ways. First, the positive match was abandoned. Second, x-ray examination did not meet the "physical inspection" requirement for an unaccompanied bag to be flown. Unaccompanied baggage from other airlines was routinely loaded on Pan Am aircraft at Frankfurt and London, in violation of XV C.1.(a). (JA 1681-83, 4192-93).

E. Denial of vital information to its pilots and deceiving the FAA

Pan Am's pilots were not informed of the abandonment of the match procedure (JA 2021-2, SA 187-88). London gate employees were told not to advise pilots of unaccompanied bags because it "made the crews jittery" and caused flight delays. (SA 166-67). Similarly, Frankfurt Alert personnel were told not to communicate security problems to flight crews because it resulted in delays. (JA 2201-03). Nor were pilots advised that an x-ray procedure had been substituted for positive match. Furthermore, although ACSSP XIV required Pan Am to advise the FAA in writing of changes Pan Am never advised the FAA that the interline bag match had been discontinued. (JA 4234).

Pan Am's station manager at Frankfurt, Leuninger, instructed Alert's Ulrich Weber to add security personnel during FAA inspections to create the appearance of security which did not otherwise exist. (JA 2214-2219). At an inspection shortly before Lockerbie, Alert sent a guard from the front end of the airplane to the back so that FAA inspectors would think that the airplane was properly staffed in both places. (JA 2219-20). The district court, in denying Alert's Rule 50 motion, observed "that Alert knowingly cooperated with Pan Am employees to disguise chronic understaffing and

noncompliance with FAA regulations at Frankfurt whenever FAA inspections were expected so that they would not have to provide more security." (JA 469).

As a further deception, after the explosion, Weber ordered that the Helsinki warning be backdated to give government investigators the impression that the warning was timely disseminated when received. (JA 2106-11).[13]

V. PAN AM'S KNOWLEDGE OF THE PROBABLE CONSEQUENCES OF FAILURE TO PROVIDE EFFECTIVE SECURITY

For at least six years prior to the bombing, Pan Am was repeatedly warned of bombs hidden in radios or other electronic devices; the grave risk of both unaccompanied and interline bags; and the danger of reliance on x-ray as a screening device. (JA 497-98, 510, 521, 1633-9, 4048-4049, 4096-97).

A. The KPI Report

In September 1986, Pan Am's management received the KPI Report from Israeli security experts commissioned to review Pan Am security at various airports including Frankfurt and London. (JA 482, 3311-13). KPI concluded that "[u]nder the present security system, Pan Am is highly vulnerable to most forms of terrorist attack. The fact that no major disaster has occurred to date is merely providential." (JA 483).

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[13] Petitioners ask why the majority opinion, below, fails to mention Weber's denial that he backdated the warning. (Pet. 25). The answer may be that the original of the *undated* copy, which should have been date-stamped when received, was put into evidence by the plaintiffs along with backdated copies and testimony of four Alert employees who witnessed the backdating (Koch, Christ, Schneider, Hoerr). The trial court found that the back-dating of the warning "was evidence of consciousness of guilt on the part of Alert for its part in the wrongful causation of the crash." (JA 470).

The Report specifically cautioned Pan Am of the risk of unaccompanied bags, criticized Pan Am for its over-reliance on x-ray and warned the airline that x-ray was "not recommended" and "disqualified in principle" as a tool to screen baggage for explosive devices. (JA 492, 497-98, 510, 514, 521, 3313). KPI advised Pan Am that a positive passenger/bag match of all bags, including interline bags, must be conducted to avoid a bomb attack. (JA 535-536, 3313).

B. Abandonment of positive match would permit unaccompanied bags

Pan Am management knew their decision to abandon positive match and substitute an x-ray procedure would permit unaccompanied interline bags, which they knew presented the greatest danger of a bomb explosion, on their flights. (JA 1865, 1870, 3057-58, 3060, 3314-15, 3924).

C. Prior fatal bombings

In 1983 a Pan Am 747 leaving Rome for New York was the target of a bomb inside an unaccompanied interline suitcase. (JA 4194). In 1985 a bomb in an unaccompanied interline bag exploded on an Air India flight over the North Atlantic, killing the 329 persons aboard (JA 4194). The bomb suitcase had been x-rayed. The official Indian Investigation report recommended that interline baggage be matched before loading and cautioned that x-ray "has its own limitations and is not fool proof. Some explosives hidden in radios, cameras, etc. may not be readily detected by such a machine." (JA 1642-1644).

D. Specific FAA warnings of impending bombings

In July 1988, following the shootdown of an Iranian Airlines Airbus by the U.S.S. Vincennes, the FAA warned Pan Am of an imminent terrorist attack against a U.S. air carrier. (JA 1614-15; 1656-60). The entire aviation community was on alert. (JA 1656-67).

In a series of extraordinary warnings in late 1988, Pan Am's management was warned of the place, time and manner of an impending terrorist bomb attack. (JA 564-68, 572-73, 1661-63, 1666-68).

On November 17, 1988, *only five weeks before Lockerbie*, Pan Am received FAA Security Bulletin 88-19 (JA 564) warning that in a raid on a mid-east terrorist group not far from Frankfurt police discovered a bomb built into a Toshiba radio cassette player, obviously intended for use on aircraft. (JA 564-66; 1661-63). The Bulletin cautioned that the Toshiba device *"was very difficult to detect by the use of normal x-ray"* and stated that the requirements of ACSSP XV C.1. must be *"rigorously applied"*. (emphasis added). (JA 564-66).

Still Pan Am did not match interline bags! Moreover, virtually all of the security staff was not informed of the warnings or advised to look out for radio cassette players. (JA 2106-08, 2134-35, 2150, 2176-2177, 2283-2286, 2347-48, 3906-08).

On December 7, 1988, *two weeks before Lockerbie*, Pan Am was issued Security Bulletin 88-22, which advised of a telephone warning in Helsinki that a Pan Am flight from Frankfurt to the United States would be bombed. (JA 572-73, 2106-2110). This Bulletin repeated the warning from Security Bulletin 88-19 about the Toshiba bomb, and the fact that it would be very difficult to detect by x-ray.

Again, key security personnel in Frankfurt were not told of the warning, including Alert's Chief of Training, Oliver Koch, who was responsible for distributing such warnings to screeners. (JA 2107-08).[14] Koch discovered the warning, which had

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[14] Petitioners ask why the majority opinion does not discuss the testimony of Wolfgang Schwab, who was one of the few screeners who had heard of the Helsinki warning. (Pet.23-24). Virtually none of the Frankfurt or London personnel received either the Helsinki or Toshiba warning including Maier, the x-ray operator, Fuchs and the other screeners at the main counter in Frankfurt, the x-ray screeners in London, and *all* other Alert screeners in London. (JA 2106-08, 2134, 2150-51, 2177,

not been date-stamped on receipt, as required, on the bottom of a pile of papers on the desk of his boss, Weber, early in the morning following the disaster. (JA 2107-09).

VI. FLIGHT 103 REFLECTED THE GENERALIZED INADEQUATE SECURITY CREATED BY MANAGEMENT.

Defendants' security for Flight 103 reflected Pan Am's general security conditions and was riddled with ACSSP violations.

Monica Diegmueller, the GSC for Flight 103 in Frankfurt, was an "alternate" who had only two to three hours of training and did not know what the ACSSP required. (JA 1979-86). She incorrectly believed that another GSC was on the ramp monitoring the aircraft and its baggage, when in fact no one was performing those required functions. (JA 2015-16).

There was no guard for Flight 103 at the Frankfurt ramp as required by the ACSSP. (JA 2156-59, 2164-65). The Alert screener assigned to do so had became ill and left his post. (Tr. 1485-86).

Screener Sabina Fuchs admitted that she had no training and had no idea what a "selectee" was, despite the fact that her principal job was to identify selectees for additional scrutiny. (JA 2351-53).

No passenger/bag match for interline bags was in place.

Pan Am's only defense against a bomb in an unaccompanied interline bag was the Alert x-ray operator Kurt Maier, who worked alone in a trailer parked on the Frankfurt ramp. (JA 3306; Tr.5684). On December 21, 1988 Maier had been employed by Alert for only seven weeks, and had been an x-ray operator for only one month. (JA 3375-79). He had no

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2286, 2347-48). Indeed, Maier, the x-ray screener at Frankfurt testified that he would have acted differently if he knew about the warning. (SA 9) The only screeners who were told anything were a few on duty at the main counter in Frankfurt on December 9 when Schwab heard about a warning regarding female Finnish passengers.

formal training, had never been shown standard training videos and had not been tested on the use of x-ray. (JA 3376-79, 3397, 3399). Alert Training Supervisor Anthony Cooke admitted that allowing a person with Maier's limited background to work alone was an unreasonable risk. (JA 3162-63).

The Toshiba warning was never given to Maier, nor was he ever given instructions to stop bags which contained a radio or radio cassette player. (JA 3405-08; Tr 6110, 6118-20).[15]

Instead, he was only told to look for "suspicious" electronic devices. (JA 3394-96; SA 10-11).[16] Defendants' x-ray expert, Dr. Grodzins, admitted, however, that x-ray could not possibly indicate if an electronic device contained a bomb. (JA 3335-36, 4576; SA 237-239, 242-245). Contrary to defendants' assertion that there were no radios in the bags he inspected (Pet.4. Fn 6), Maier admitted that *he did not remember* whether any of the bags he x-rayed for Flight 103A contained a radio cassette player.[17]

Maier x-rayed thirteen bags for Flight 103 (JA 3392). One of those bags was the interline Air Malta Flight 180 bag transferred to Flight 103 through the Frankfurt Airport computerized baggage system. This bag was unaccompanied, as no passenger from Air Malta Flight 180 was aboard Flight 103.

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[15] Numerous other Alert screeners testified that no instructions were ever given to remove all electronic devices. (JA 2134, 2150, 2170-71, 2177, 2286; SA 8B, 8C).

[16] Petitioners' statement that Pan Am "required that *every* radio revealed by x-ray inspection. . .be removed and operated" (Pet. 24) is thus false and was rebutted by Maier himself, who was doing the x-raying.

[17] Petitioner's statement (Pet.4, Fn6 and Pet. 24)) that Maier "testified that there was no radio in the bags that he inspected" is based on testimony that Maier recanted! (JA 3413-21, SA 12-20). Furthermore, plaintiffs never contended that Maier, with or without eyeglasses, couldn't recognize a radio cassette player on his x-ray screen. What plaintiffs did claim is that no one, including Maier, could detect the wires and explosive material that would indicate it was a bomb.

Diegmuller, the GSC, told Captain Michael Anthony, the pilot of Flight 103 from Frankfurt to London, that there were no security problems for the flight. (JA 1987-88, 2020-21).

In London, the bags from Flight 103A were loaded into an aluminum container, AVE 4041, and placed aboard the 747 aircraft. (JA 2510-11, 2521-22, 2525-26; Tr. 2485-91). The GSC in London was absent, so Passenger Service Agent Price "acted" as GSC. He was not a qualified GSC, had no security training and was completely unaware of the ACSSP requirements. (JA 2535-37, 2540, 2545).

As the plane was ready to leave the gate, Price learned that passenger Basuta had checked two bags but had not boarded. (JA 2545-46). Price was required under ACSSP XIII E to inform the pilot-in-command, Captain MacQuarrie, of the unaccompanied bags, but did not do so. (JA 2546-48). MacQuarrie departed unaware that unaccompanied bags, including the Basuta bags and the Air Malta bag, had been loaded on his aircraft.

VII. THE LOCKERBIE BOMB WAS IN AN UNACCOMPANIED INTERLINE BAG LOADED ON FLIGHT 103 IN FRANKFURT BECAUSE OF PAN AM'S FAILURE TO PERFORM A POSITIVE MATCH.

The Scottish-American criminal investigation commenced immediately. (JA 1517, 1532). Wreckage was meticulously recovered, catalogued and stored. (JA 1522-27). Large portions of the plane were reconstructed. (JA 617-19, 639). Hundreds of police officers participated in the effort and about twenty officers with experience in property identification undertook the process of tracing the recovered baggage to Flight 103's passengers. (JA 1524-25).

The forensic investigators determined that the explosion was caused by a bomb in a Toshiba radio cassette player packed in a Samsonite suitcase on the second layer of suitcases in container AVE 4041, in position 14L of the 747s'

cargo hold. (JA 629, 682, 2405-06). The location of the blast itself indicated the suitcase was a Frankfurt interline bag.[18]

The police identified thirteen different items inside the suitcase when the bomb exploded, including baby clothing, a women's blouse and men's trousers and an umbrella. (JA 2438-39, 2461-62). They were traced to Malta by Detective Chief Inspector Harry Bell who identified their places of manufacture and then, through job lots, the retail shop in Malta named "Mary's House" where they had been sold. (JA 2444, 2448, 2452-55).

Plaintiffs corroborated the Air Malta connection established by the criminal investigation with the Frankfurt Airport computer printout, which showed the movement of all suitcases to Pan Am Flight 103, the time each was "coded in" and the "station" where it was coded in. (JA 2376-78). The printout showed that at 1:07 p.m., a bag for Pan Am 103 was coded in at Station 206 and delivered to Pan Am at Gate B44 at 3:23 p.m. (JA 581, 2383-84).

The printout's accuracy was confirmed by the computer control room supervisor (JA 2357-60, 2365-70), and by the baggage traffic controller. (JA 2354-56, 2376). The Station 206 worksheet showed that at 1:07 p.m., only bags from Air

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[18] Petitioners, as well as the dissenting judge below say that no one except the terrorists knows how the bomb got on the flight.(Pet. 3) That is wrong. Plaintiffs traced the course of the bag from the Air Malta airplane on the tarmac at Frankfurt airport, to FAG baggage conveyance system coding station 206, through the conveyance system to holding station HS33, to Gate B 44 where Pan Am flight 103 A, the 727 which would fly to London, was loading, onto a small wagon which Tuczu took to Maier's x-ray machine, through the x-ray machine and back on the wagon, to the 727 where it was one of the 13 last bags loaded, to London Heathrow Gate K16, where it was one of the first bags down the rocket, onto the second level of bags in Container AVE 4041, and to the 747 at Gate K14 where container AVE 4041 was loaded in the 14L position. (JA 2513-2522, 2462-65, 2506-07). Plaintiffs proved the center of the explosion was on the second level of bags in that container in a brown Samsonite suitcase with clothing and other materials around it that had been manufactured and bought in Malta at a retail store by someone who didn't care what size clothing he was buying. (JA 2444-55).

Malta Flight 180 were coded in. (JA 744, 2388-89; Tr. 1970-71). There was no passenger for Flight 103 from Air Malta Flight 180. (JA 716-17).[19]

All U.S. and U.K. police and investigating agencies after meticulous investigation and analysis concluded that the bomb bag was unaccompanied. (JA 2396, 2400, 2405-06; Tr. 2897, 2905-06; JA 2579, 2581, 2584; 176-77; JA 2582-83; SA 172-74; JA 2632; SA 175; JA 2588, 2573).

VIII. DEFENDANTS' CASE

A. Defendants were given broad freedom to prove a case

Defendants raised a panoply of defenses in the six weeks afforded them to put in their case. They called Maltese witnesses to show that security procedures were so tight that the bomb could not have originated there. They put FAA "test objects" into evidence (JA 4388-90); discussed the technology of color x-rays, thermal neutron analysis machines and backscatter bomb detection machines (Tr. 5493-5500; JA 1126-28); played a lengthy training video to the jury (Tr. 4235-40); and presented evidence of "bomb" cookies. (Tr. 4885-90). They introduced FAA inspection reports, (JA 4076-4086), explored minor FAG record keeping anomalies (Tr. 4164, 4439-56, 4602-09, 4610-25, 4686-702); explored the possibility that the time registered on the FAG computers could vary by several milliseconds (Tr. 5310-13, 5321-38); suggested that time entries recorded on the worksheets might not be synchronized with the time on the FAG computers (Tr. 4449), showed the vast number of access points and gates at both the London and Frankfurt airports. (JA 1168, 3659; Tr. 3799, 4844-57, 6504),[20] and raised their

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[19] Defendants' own Maltese witnesses helped establish the Maltese origin of the bomb suitcase. (Tr. 5882, 5889-90, 5923). Air Malta's own records showed a discrepancy in the number of bags loaded aboard KM 180. (Tr. 5894-97, 6013-15, 6028-35).

[20] In another misstatement petitioners say "Pan Am was prepared to show - but not allowed to show - that . . . there were almost 40,000

Hubbard bag a/k/a "13th bag" defense, i.e. that of the 13 checked bags x-rayed by Kurt Maier, one belonged to a Pan Am pilot and that it, rather than the Air Malta bomb bag, was the thirteenth bag x-rayed. (Pet. 4-5, Fn6) (Tr. 4741-4808, 5420-56; JA 1130, 1132-33).

B. Defendants' experts

Defendants did not call any aviation security experts. The reports and depositions of the experts they produced showed that they would not offer opinions regarding defendants' conduct or how the bomb got on the flight. (JA 320, 329-32, 447).[21]

Instead, defendants sought to introduce what they called "background" on terrorist groups and testimony on how terrorists are "formidable", how terrorism is like "other forms of warfare", how it is "virtually unstoppable", and how governments did not aid and protect airlines sufficiently and they offered Scotland Yard bomb squad members to provide anecdotal histories of various unrelated bombings. (JA 433, 447, 4416-4434).

C. Sonesen's "oral waiver"

The record below contradicts defendants' unsubstantiated claims that the FAA authorized the use of x-ray as a substitute for the Section XV match procedure.

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airport workers at Frankfurt with access to restricted areas, and they could come and go without having their bags searched (JA 4448-62)." (Pet. 20, Fn 29). But this *was* introduced into evidence by defendants and *discussed specifically* in their closing argument to the jury. (Tr 6501-6502).

[21] Petitioners' effort to compare the exclusion of some of their expert testimony with the admission of evidence of diverse misconduct in defendants' security operation (Pet. 19-20, Fn 29) is entirely misplaced. Plaintiffs proved gross failures to show these were not isolated instances of neglect, but, rather, a pattern resulting from central management contempt for security, and cost cutting. Defendants' purported expert testimony, on the other hand, was not based on any evidence in the case, and it was from experts who had not examined the record and who professed *not* to have any opinion on how the bomb got on the airplane.

The district court found that no proof of FAA verbal authorization was presented. (JA 3075, 3288). Moreover, the court held that such proof, even if it existed, was inadmissible because Pan Am was charged with knowledge of the ACSSP[22], knew that any amendment or exemption could only be made in writing, and also knew that FAA personnel had no authority to make verbal changes. (JA 3046). The court of appeals affirmed the district court's ruling.

Defendants had offered, or suggested, three witnesses on the point: Sonesen, Cozzi and Plaskett. As to the testimony of Cozzi, the court of appeals, as well as the district court, held it was inadmissible hearsay. (Pet. App. 14a; JA 3265, 3267). Plaskett, the Chairman and CEO of the company, admitted he did not remember any conversations concerning FAA authorization. (Pet. App. 15a).

Sonesen, Pan Am's critical witness on the point, was not called to testify at trial, nor did defendants offer portions of his four day deposition testimony. In their sworn interrogatory answers, defendants claimed that FAA authorization occurred at an October 1987 meeting of the Air Transport Association (ATA) Security Committee in Miami Beach, Florida attended by FAA Security Director Salazar who "approved x-ray as an alternative for the physical search of unaccompanied baggage." (JA 833). Sonesen testified on at least three separate occasions under oath in 1990 and 1991 that his "understanding" of FAA "dispensation . . . from the provisions of Section 15 . . . dates from that ATA meeting in October of 1987 in Miami." (JA 868-69, 1025-26, 1028, 1043-44, 1046, 1093).[23]

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[22] Several times petitioners attempt to equate and confuse the state of mind of the defendant air carrier, Pan Am with the alleged state of mind of Mr. Sonesen. See Pet. 14, 15, and 19.

[23] Pan Am also withdrew its Security Director, Cunningham as a trial witness. Cunningham had previously claimed it was his "understanding" that Salazar discussed use of x-ray in lieu of the match at a March 1988 meeting of the ATA security group in Arizona. (JA 975, 977, 994). After learning that Salazar did not attend the March meeting, Cunningham claimed that FAA Security Officer Blazer, who did attend, was the source of his information. (JA 990). Lally, who chaired that meeting,

This testimony was undermined when document discovery revealed that the Pan Am had acted by December 1986—nine months *before* the Miami meeting—to use x-ray and abandon the match at extraordinary security airports. (JA 1101-02, 3302).

Moreover, Pan Am's defense was at odds with the fact, eventually admitted by Sonesen himself, that the 1987 Miami meeting dealt *only* with procedures for lower security airports, mainly located inside the U.S., and that the Section XV C.1.(a) standards for "extraordinary security" airports were *never* discussed. (JA 1026-28).[25]

The ATA Security Chief who chaired the Miami meeting, acknowledged that Salazar did not discuss extraordinary security procedures. This was further confirmed by the minutes of the meeting and other airline representatives in attendance. None of the participants could recall any discussions regarding the Section XV C.1.(a) passenger/bag match or the use of x-ray at extraordinary security airports. (JA 836-39, 852, 899-900, 904-05, 917, 922).

In 1991, Sonesen contradicted his prior testimony, and for the first time alluded to the possibility of FAA authorization dating back to 1986. (JA 1018, 1035). On July 6, 1992, one half hour before plaintiffs' closing argument at the trial, defendants served a supplemental interrogatory response stating that Sonesen initially received oral approval for Pan Am

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testified that there were no discussions regarding extraordinary security airports. (JA 898-901, 904-06, 917). This was confirmed by the minutes and others present, including other airline representatives and Blazer himself. (JA 841-48, 852, 930-32, 936-39).

[25] Sonensen said that at the meeting "we were discussing [ICAO] 514 . . . not 15", and that Salazar "gave me the impression" that he was granting "relief", "waiver", "dispensation", an "exemption", from ICAO Standard 5.1.4. (JA 870, 876-79, 1014-17, 1025-30, 1043-46, 1095). The ICAO Standard 5.1.4 requirements are set forth in ACSSP Section VIII and establish the procedures for lower security airports which, as Sonesen acknowledged, were supplanted by Section XV C.1.(a) for extraordinary security airports. (JA 1017, 1031). Salazar testified that only ICAO 5.1.4. was discussed at the meeting. (JA 2081-82).

from FAA personnel in 1986, rather than at the 1987 Miami meeting.[26] (SA 98-101).

This second version of Pan Am's defense, however, was fatally flawed: Sonesen was unable to give the content of the alleged hearsay conversation(s) and could not provide the name(s) of the FAA personnel involved, their job title(s) or authority, their responsibilities regarding the ACSSP, or the date(s) (except for the year 1986) or the venue(s) of the discussion(s).[27] (JA 1018, 1035).

With respect to Sonesen the court of appeals found, first, that defendants' argument that the alleged waiver was an "interpretation", rather than an amendment, exemption, or waiver, was untenable, since XV.C.1(a) was unambiguous. (Pet. App. 8a-10a).[28] Next it found that the record did not reveal any express offer of proof by defendants of what Sonesen's testimony would have been, and its "faith in the defen-

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[26] During the discussions before the district court, defendants relied on the 1987 Miami meeting as the basis for their defense and did not mention any 1986 conversations. Counsel never articulated the substance of Sonesen's proffered trial testimony or provided a cohesive narrative of the alleged FAA authorization. (JA 1956-57, 2855-58, 2940-41, 2953-58, 3004-09, 3041-49, 3073-75, 3627; SA 192-96, 203, 216-21, 224-27).

[27] When Sonesen stated that he could recall no conversation with Salazar prior to the Miami meeting, he was asked "Can you recall any conversation you had with anyone else from the FAA, prior to October of 1987, regarding the passenger/baggage match requirement of Section 15?" He answered: "Specifically, no." (JA 1018).

While defendants rely on the testimony of Pan Am Task Force Co-Chairman Cozzi in addition to Sonesen, Cozzi conceded that he was "relying completely on Mr. Sonesen" for his claim that oral approval was obtained from the FAA. (JA 3275).

[28] Pan Am's own management and security officers conceded that XV.C.1(a) was unambiguous and required a match and noncarriage or physical inspection (by "open[ing] up the suitcase") of unaccompanied bags. (JA 1029-30, 3289-90, SA 1-2, 209-10, 212-13). Likewise, Pan Am alleged, in their answers to interrogatories and elsewhere, that the FAA "approved" x-ray as an "alternative" to Section XV's requirements, an acknowledgment that the provision itself did not permit x-ray.

dants' versions of Sonesen's testimony is not enhanced by the fact that Sonesen's 1990 deposition testimony is substantially inconsistent with the representations made by the defendants before us." (Pet. App. 13a).

The court said the failure to properly offer the proof would, itself, waive the potential error, but even "assuming without deciding that defendants sufficiently preserved their objection" does not change the result (Pet.App. 16a-17a).

First, the court of appeals said viewing the exclusion as being based on the "government authorization" theory, that required the existence of a government official who had authority to grant the waiver, and "the FAA officials allegedly contacted simply did not have the actual authority to grant any verbal authorization for Pan Am's x-ray only inspection of interline bags. (Pet.App. 17a).

Second, viewed as "mistake of law", that defense was not allowed, except in limited tax cases, and a heavily regulated air carrier may not claim ignorance of the law as an excuse. (Pet.App. 18a-20a).

Third, viewed as evidence of state of mind of the carrier, the court of appeals, citing *Vinieris v. Byzantine Maritime Corp.*,731 F.2d 1061 and Fed.R. Evid.403 held that "because the oral waiver evidence was so intertwined with the government authorization and mistake of law defenses . . . . admission. . .might well have been unnecessarily confusing and perhaps prejudicial so as to justify the trial court's refusal to allow its admission." (Pet. App. 20a-21a).

Fourth and finally, the court held that "even if it were an abuse of discretion to deny admission of the oral waiver evidence on the foregoing grounds, we hold that such an error was harmless;" ie. "it had no substantial effect on the jury's verdict, because the record was replete with overwhelming evidence that Pan officials ignored repeated warnings and signals that its security measures were insufficient." (Pet. App. 21a).

The court cited proof of Pan Am's knowledge of a frightening buildup of bombings, receipt by Pan Am of the 1986 KPI Report showing that Pan Am was highly vulnerable to most forms of terrorist attacks, and receipt in both November and December, 1988, just before the Lockerbie disaster, of Security Bulletins 88-19 and 88-22, specifically warning of the discovery of a Toshiba bomb and warning that the bomb was difficult to detect by normal x-ray, and the Helsinki warning that a Pan flight from Frankfurt to the United States would be bombed within two weeks. (Pet. App 21a-23a).

Defendants also made the argument that the Sonesen purported testimony of oral waiver was admissible to rebut the testimony of Raymond Salazar, the FAA Director of Security, that Sonesen's statement in a Pan Am E-mail message that Salazar had granted x-ray as an alternative, was false. The court of appeals found that whether to allow otherwise inadmissible evidence in to rebut a false impression left by other inadmissible evidence introduced by the opposing party is left squarely to the trial court's discretion, and the trial court had offered the defendants a curative instruction directing the jury to disregard the Salazar testimony, which offer the defendants refused.[29] (Pet. App. 16a.)

D. The proffer of U. K. regulations.

Defendants attempted to introduce evidence of British "regulations", which they claimed did not require positive match. Some of this evidence was admitted.[30]

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[29] Even Sonesen's E-mail did not say that Salazar granted x-ray as an alternative to the threshold positive match. It was said to be an alternative to the physical inspection of the unaccompanied bag *after* the match was completed.

[30] For example, defendants read to the jury the deposition testimony of Norman Shanks that Chris Price's failure to inform Captain MacQuarrie of the unaccompanied Basuta bags aboard the aircraft and his dispatching of the aircraft with those unaccompanied bags on board did not violate British security practices. (Tr. 3839-43).

Documents offered by defendants included a version of the Toshiba warning first received by Pan Am four weeks *after* the disaster and various items concerning aspects of Heathrow Airport security. Apart from their irrelevance, all but one of the documents were informational "circulars" which, unlike "directions", do *not* have the force of law. Moreover, many of the circulars were issued in 1985 before ACSSP XV C.1(a) came into effect, and had lapsed in 1987. (Tr. 3781, 3784-5, 4978-9).[31] The circulars were properly excluded because of their non-binding nature, vagueness and their being too remote. (Tr. 4304-4305, 4314).[32]

Contrary to Petitioners' representation the one "direction" excluded from evidence did *not* permit x-raying in lieu of checked baggage/passenger matching. Rather, it required "reconciliation" of all bags to passengers—the same requirement contained in XV C(1)(a).[33] What petitioners' really sought to offer was one opinion in several pages from the deposition of James Jack, Principal Aviation Security Adviser for the British Department of Transport, that British regulations would have permitted Pan Am to x-ray unaccompanied interline bags that had been identified by the baggage/passenger reconciliation process. The trial court found that, inasmuch as Pan Am was bound to follow the higher standards of

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[31] Only one U.K. regulation or "direction", Ex. (Iden.) EL, was excluded from evidence. It was excluded because defendants' counsel sought to unfairly manipulate its language. The court offered to admit EL and plaintiffs consented to its admission provided defendants' counsel gave the plain meaning to the word "operator", which defendants refused to do. (Tr. 4316-23). In any event it required a passenger baggage "reconciliation" or match. Pan Am violated it, as well as XV.C.(1))(a).

[32] The two arguably relevant circulars defendants sought to introduce were excluded for those reasons, Exhibits EJ and EK (Iden.), both of which required that baggage be checked against passengers and removed if no passenger unless the aircraft captain was satisfied there was no danger.

[33] The statement at Pet. 24 that the British Government authorized the use of x-ray to screen unaccompanied baggage is misleading. "Reconciliation," which means the same as positive match, was required *first*. See Jack deposition, designated by defendants, p. 30.

the ACSSP, this testimony was irrelevant unless Pan Am admitted it *knew* it was violating ACSSP, but was relying on the British standards on the issue of its state of mind. Since the defendants refused to admit that, the trial court refused to admit Jack's opinion.

The court of appeals found this was error, but harmless since there was other evidence that Pan Am's conduct comported with British regulations, that plaintiffs' case rested principally on violation of ACSSP regulations, and since Pan Am and Alert presented a strong defense concerning the effectiveness of the use of x-ray, anyway. On the entirety of the 7,000 page record the court did not believe the few pages, including the one sentence Jack opinion, regarding British requirements that Pan Am also violated, would have persuaded the jury. (Pet. App. 25a).

IX. THE TRIAL COURT'S CHARGE TO THE JURY ON WILFUL MISCONDUCT AND CAUSATION.

The trial court's charge to the jury was largely taken from defendants' requests to charge, and it followed the traditional principles advanced in the cases approved by the petitioner (Pet.11-13).[34]

First the court identified the two separate issues. (App. 1a). Then it explained wilful misconduct. (App. 1a). Next it made specific reference to violation of FAA regulations, and pointed out that it might or might not be wilful misconduct. (App. 1a-2a).[35] Then the trial court charged the jury on the issue of causation. (App. 2a).

The defendants did not object or except to this charge.

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[34] Relevant excerpts of the trial court's charge to the jury are set forth in the appendix. (App. 1a-2a).

[35] Petitioners' statement (Pet. 13) that the decision below repudiates the established standard for wilful misconduct and replaces it with a new and simple standard: "did the carrier violate a safety rule?" is belied by the court's charge.

REASONS FOR DENYING THE WRIT

Defendants' petition lists three questions for review, but those questions boil down to one issue: did the district court commit any error in the admission or exclusion of evidence which so prejudiced the defendants as to require a new trial?

Petitioners misstate the facts and history of the case to make it appear that there are important legal questions involving the interpretation of the Warsaw Convention regarding the definition of wilful misconduct and the requirement that the wilful misconduct caused the damage.

There are no such issues herein. The courts below applied the standard definition of wilful misconduct in Warsaw cases. Petitioners overlook extraordinary evidence of Pan Am's actual knowledge of the danger, including the FAA security bulletins issued in the two months before the disaster, warning of the specific danger of a Toshiba type bomb and of a bombing on a Pan Am flight from Frankfurt to the United States, and highlighting the fundamental requirement of the passenger/baggage match, a requirement which Pan Am illegally abandoned two years before the disaster and continued to ignore in the face of a dire threat.

In addition, the courts below required plaintiffs to prove that the airline's wilful misconduct was a substantial factor in causing the disaster. Petitioners overlook the detailed proof which showed that the bomb was contained in a Toshiba radio cassette player packed in an unaccompanied interline bag transferred from an Air Malta flight and accepted and loaded by Pan Am on flight 103, as well as the overwhelming evidence, cited by the court of appeals below, of knowledge of the danger and knowledge of the probable consequences, by petitioners, and the abysmal failures in *every* aspect of petitioners' security.

Finally, there was no "resolution of disputed facts" by the court of appeals, below.

I. THERE IS NO CONFLICT BETWEEN CIRCUITS AND THE TRIAL COURT'S DISCRETIONARY RULINGS ON EVIDENCE WERE CORRECT.

A. There is no conflict between the court below and any other circuit regarding the definition of wilful misconduct and causation under the Warsaw treaty.

Wilful misconduct. The district court's jury charge contained the uniform definition of wilful misconduct which has been routinely applied by courts for over forty years. (App. 1a-2a). Pan Am did not object to the charge. In affirming the judgment, the Second Circuit again defined wilful misconduct in accordance with that uniform rule. The standard cited by Pan Am in its petition, based on cases from four Circuits and four state courts (Pet. 11) is identical to the test applied by both courts below.

The jury was expressly charged that a regulatory violation was not in itself tantamount to wilful misconduct. (App.1a-2a). The court of appeals below held that "A carrier might not have acted with wilful misconduct, even were it to have failed to comply with an FAA regulation." (Pet. App. 13a). Pan Am's claim that the courts below held that wilful misconduct could be shown simply by the violation of a safety rule is groundless.

Causation. Pan Am also did not object to the district court's charge on causation, which was proper and in accord with the treaty. (App. 2a). The jury made a separate special verdict finding that Pan Am's wilful misconduct "was a substantial factor in causing the disaster". As the court of appeals below held, "the district court carefully and in an extensive and well balanced charge instructed the jury that it must find not only wilful misconduct, but also a causal connection between that misconduct and the passengers' deaths." (31a).

The court below's holding that causation can be established "by inference based on the totality of the circumstances" applied a hornbook rule not subject to dispute. The District of

Columbia Circuit reached a similar conclusion in *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1481 (D.C. Cir.), *cert. denied*, 112 S.Ct. 616 (1991), which upheld a wilful misconduct verdict based on circumstantial evidence of "a pattern of conduct giving rise to liability."Pan Am's argument that the courts below approved a "res ipsa loquitur" standard for causation is frivolous.

In sum, there is no conflict regarding the treaty's definition of wilful misconduct or causation and no basis for the exercise of this Court's discretionary jurisdiction.

B. The trial court's discretionary rulings on evidence were correct.

Defendant Pan Am did not move at trial for judgment as a matter of law under Fed. R. Civ. P. 50 and defense counsel conceded that plaintiffs had presented sufficient proof to support the liability verdicts.

As a result, the only issue raised on appeal before the Second Circuit was whether the district court abused its discretion over the admission of evidence. There was no such abuse.

1. The Government authorization defense.

Pan Am failed to make a proper offer of proof. Pan Am's so-called government authorization defense relied on fatally vague statements of counsel that were contrary to the factual record and unsupported by a proper offer of proof. Pan Am alleged that its employee Sonesen received oral approval from the FAA but did not specify the name and office of the FAA employee involved, or the date (other than late 1986 or early 1987) and place of the conversation. Neither Sonesen, nor his immediate superior, Security Director Cunningham, was called to testify and Pan Am's claims were contradicted by Sonesen's prior testimony and the airline's own answers to interrogatories.

It is well established that the failure to present the factual predicate for a defense to permit trial court and appellate

review is a proper basis for exclusion. *Jones v. Berry*, 880 F.2d 670 (2d Cir. 1989)(an offer of proof should have be made to permit "the reviewing court to make a reasoned evaluation of the impact of the trial court's decision.").

Pan Am's defense was properly barred as contrary to clear FAA regulations. The courts below correctly ruled that Pan Am was charged with knowledge of the subject regulations mandating a passenger/baggage match and requiring that any change to that procedure necessitated a written application by the airline and written FAA approval. (19a); 14 C.F.R. §§ 11.25(b)(5), 11.27(e); 108.25(b)(c); 49 U.S.C. §§ 1357(a)(2)(B), 1421(a)(6)(c). Pan Am's last minute claim that the regulation was subject to an alternative "interpretation" was unsupported by any witness or proof, and was contradicted by the clear language of the regulations, the testimony of Pan Am's officers and employees and the airline's answers to interrogatories.

To allow Pan Am to challenge the subject FAA requirements under the circumstances herein would mock the carrier's regulatory obligations and improperly present the jury with a question of law. As the Second Circuit ruled, "[t]here is cause to be wary because of the ease with which air carriers could fabricate sham defenses and ignore with impunity safety regulations." (20a). Pan Am has failed to cite a single case in conflict with the Second Circuit's holding or which allows an airline in a Warsaw (or other tort) action to introduce claims of mistake contrary to clear and binding regulations.

2. Defendants' pattern of misconduct in failing to provide mandated security was admissible.

Plaintiffs demonstrated that the entire Pan Am security system was corrupted by the corporate management's contempt for security, reflected by cost cutting and deception, which resulted in security failures in every element of the system, the most important example of which was an abandonment of the baggage match requirement.

Proof of the pervasive misconduct involving Frankfurt and London security was admissible on the issue of defendants' wilful misconduct. The prevalence of wrongs permitted the jury to infer that Pan Am was reckless and knew the probable consequences.

Fed. R. Evid. 404(b) provides that "[e]vidence of other . . . wrongs, or acts" is admissible to prove motive, intent, plan or knowledge.[36] Wilful misconduct may be based on the totality of a defendant's wrongdoing. *Complaint of Tug Ocean Prince v. United States*, 584 F.2d 1151, 1164 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). Similarly, "evidence of motive and of intent may be adduced for the purpose of establishing, by culmination and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." *Goldwater v. Ginzburg*, 414 F.2d 324, 342, 336-37 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

Defendants' pattern of failures and misconduct in all areas of their security functions was also probative on causation. The evidence that the passenger and baggage screeners were untrained, that the aircraft was left unguarded, that critical warnings were not distributed and that substantial cost-cutting had occurred, allowed the jury to infer the causal link between defendants' misconduct and the disaster, even if it rejected the Air Malta proof. As reflected in the trial court's charge, accepted by the petitioners, multiple acts of wilful misconduct may be proven, and it is for the jury to determine if they constituted substantial cause of the deaths.

---

[36] Courts have repeatedly held that relevant evidence includes the "overall context", "pattern", "state of mind" and "complete story" of a defendant's course of conduct. *E.g.*, *Ismail v. Cohen*, 899 F.2d 183, 188-89 (2d Cir. 1990); *United States v. Diaz*, 878 F.2d 608, 613-16 (2d Cir.), *cert. denied*, 493 U.S. 993 (1989); *United States v. Brennan*, 798 F.2d 581, 589-90 (2d Cir. 1986); *United States v. Smith*, 727 F.2d 214, 219-21 (2d Cir. 1984). Courts have also approved the introduction of background evidence "to show. . .the circumstances surrounding the events or furnish an explanation of the understanding or intent with which certain acts are performed." *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988).

II. DISCUSSION IN THE MAJORITY OPINION DID NOT CONSTITUTE THE RESOLUTION OF DISPUTED FACTS IN DEROGATION OF THE RIGHT OF TRIAL BY JURY.

The claim by the petitioner that the court of appeals resolved disputed questions of fact in derogation of the right of trial by jury, is nonsense. In its discussion of the exclusion of some evidence the court found that there might well have been no error at all, but even if there was, it was harmless, citing other admitted evidence that would have overshadowed it in any event. This was not the resolution of disputed facts. It was an explanation of why the error, if it existed, was harmless.

CONCLUSION

For the reasons heretofore stated the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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December 21, 1994

APPENDIX

APPENDIX

Excerpts from The trial court's charge to the jury on wilful misconduct and causation.

First the court identified the two separate issues:

> "You will decide two questions. First, whether or not the defendants engaged in one or more acts of wilful misconduct. Second, whether any wilful misconduct that you find was a proximate cause of the destruction of Flight 103 and the deaths of its passengers.
>
> If you find that wilful misconduct on the part of either or both defendants was a proximate cause of the passenger's death, each plaintiff will be entitled to recover his or her actual damages." (TR 6555)

On the issue of wilful misconduct itself the trial court further charged the jury:

> "Wilful misconduct is the intentional performance of an act with knowledge that performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply disregard of the probable consequences of the performance of the act.
>
> Likewise, the intentional omission of some act with knowledge that such omission will probably result in damages or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, would also be wilful misconduct." (Tr. 6557)

With specific reference to violation of FAA regulations the court added:

> "I instruct you that the violation of FAA regulations and safety standards, and/or defendant's own internal safety

standards and procedures would not necessarily constitute wilful misconduct.

However if you find that any such violation was intentional, with knowledge that the violation would probably result in damage or injury, then that would be willful misconduct. Likewise, it would be willful misconduct if an intentional or knowing violation was done with a wanton and reckless disregard of the consequences.

Plaintiffs claim multiple violations of said regulations and standards by the defendants and their employees and have detailed in their summary arguments the particular conduct and particular regulations and standards which they say constituted these violations, or more or all of which, together with the remainder of their evidence, according to them, prove both misconduct and willfulness which they claim was a proximate cause of the death of the passengers." (Tr. 7557-8).

On the issue of causation the trial court charged the jury:

"If you determine that there was no such willful misconduct, then you must stop right there and you must bring in a verdict for the defendants. If, however, you find that either or both the defendants or any of their employees committed one or more acts of willful misconduct, then you must go on to consider whether or not such willful misconduct as you have found was a proximate or the legal cause of the death of the passengers on the plane.

Now, to be the legal cause of this result, namely, the death of the passengers, the willful misconduct must be a substantial factor in bringing about that result.

Furthermore, there must be an actual and continuous sequence connecting the act of willful misconduct with the death of the passengers.

I say willful misconduct must be a substantial factor in bringing about the deaths." (Tr. 6558-9).

* * *

"An act or omission by a defendant is not a proximate cause of an accident if the accident would have occurred anyway, that is, even absent the defendant's act or omission.

The mere fact that this accident happened, standing alone, does not permit you to draw the inference that this accident was caused through the fault of either defendant. Thus, the mere fact that there was a bomb placed on board the aircraft does not prove that the defendants were guilty of willful misconduct that caused the crash and, in fact. does not prove any element of the plaintiffs' case." (Tr. 6561).

(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

JUDITH A. PAGNUCCO, DONA BARDELLI BAINBRIDGE,
MOLENA A. PORTER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS *

	Page
A. The Wilful Misconduct Standard	1
B. The Burden of Proving Causation	3
C. The Appellate Fact-Finding	4
D. Plaintiffs' Treatment of the Evidence	6
E. The Proffer	7
CONCLUSION	9

---

* There has been no change in the Rule 29.1 listing contained in the petition for certiorari.

TABLE OF AUTHORITIES

Cases: Page

Cheek v. *United States*, 498 U.S. 192 (1991) 8
Huddleston v. *United States*, 485 U.S. 681 (1988) .. 4
In re Korean Airlines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991) 3, 4
Kotteakos v. *United States*, 328 U.S. 750 (1946) 6-7
Tug Ocean Prince, Inc. v. *United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979) 4
United States v. *Rubin*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979) 7

Treaties, Statutes and Rules:

Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), Article 25, 49 Stat. 3020, *reprinted at* 49 U.S.C. app. § 1502 note ..... *passim*
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Federal Rule of Civil Procedure 50 6
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REPLY BRIEF FOR PETITIONERS

The legal standards announced by the court of appeals and presented for review by Pan Am do not vanish because the plaintiffs, in their opposition, ignore them and present a one-sided version of the evidence that they were allowed to argue to the jury while Pan Am's defenses were excluded.

A. The Wilful Misconduct Standard. The court below held that all evidence of the carrier's good faith belief that the x-ray procedure complied with the ACSSP and would not result in probable death or injury can be excluded under the criminal law doctrine that ignorance of the law is no defense. Until that decision, it had been settled law that the carrier's state of mind is the critical

ingredient of wilful misconduct under Article 25 of the Warsaw Convention and that even an *intentional* violation of a safety rule is not wilful misconduct unless committed in knowing or reckless disregard of probable death or injury.

Plaintiffs barely mention this ruling and wrongly pretend that it does not conflict with the large body of federal and state decisions cited by Pan Am.[1] They have also omitted any reference to the decisional law of other nations or to the uniformity of liability standards that was reintroduced by the Hague Protocol. Similarly, they do not take issue with the fact that virtually every activity of a carrier is subject to a body of safety rules so pervasive that almost any accident will afford plaintiffs an opportunity to allege a violation of a safety rule.[2]

Plaintiffs' principal point is that the jury charge contained the tried-and-true standards of wilful misconduct (Opp. 26). As the dissent showed (App. 70a), a proper jury charge becomes "meaningless" when the carrier's side of the story—evidence of its state of mind—is excluded. By implanting mistake-of-law doctrine in the determination of wilful misconduct under Article 25, the court below has introduced a broad bar against evidence that would explain the basis for the carrier's action and its understanding as to whether that action would probably

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[1] While plaintiffs state that "Pan Am has failed to cite a single case in conflict with the Second Circuit's holding . . ." (Opp. 28), the conflicting case law is laid out at pp. 11-14 of the petition.

[2] While plaintiffs argue that Pan Am's position that the x-ray procedure complied with the ACSSP is "contradicted by the clear language of the regulations" (Opp. 28), this contention ignores, *inter alia*, the fact that, *in five inspections at London and Frankfurt prior to Lockerbie, the FAA had found the x-ray procedure to be in compliance with the ACSSP* (*e.g.*, J.A. 4077-86). Moreover, following the disaster, the FAA did not cite Pan Am for using x-ray inspection in violation of the ACSSP (J.A. 3011-13); instead, it revised the ACSSP to clarify its requirements (J.A. 4125-26).

result in death or injury. Neither the court below nor the plaintiffs can explain how that result can be other than to gut the established criteria for wilful misconduct and to turn safety rules violations into wilful misconduct *per se*. Review by this Court is warranted to preserve the principal purpose of the Convention—to place limitations on an air carrier's liability—and to restore the standard for lifting those limitations that has been historically applied by U.S. and foreign courts.

B. The Burden of Proving Causation. The court below ruled that when the actual cause of a disaster is unknown or sharply disputed—that is, when there is a deficit of proof of actual causation—a plaintiff may compensate for that deficit by introducing extensive evidence on a diverse array of alleged misconduct and then ask the jury to infer from the "totality of the circumstances" that some act or omission by the carrier must have been the cause of the disaster (App. 30a-31a). This ruling introduces *res ipsa loquitur* as a substitute for proof that specific acts of the carrier not only amounted to wilful misconduct, but were themselves a proximate cause of the disaster.

Until the ruling below, the Convention had required plaintiffs, when seeking to set aside its liability limitations, to prove that specific acts or omissions amounting to wilful misconduct were a cause of the disaster. Thus, foreign courts and commentators have concluded that the limits of the Convention may not be lifted when the cause of the accident is not proven; and two circuits have held that *res ipsa loquitur* may not be used as a substitute for actual proof of causation in a wilful misconduct case under Article 25 (Pet. 20-22).

Plaintiffs and the court below erroneously rely on *In re Korean Airlines Disaster*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991), which holds only that circumstantial evidence (as opposed to eye-witness

testimony) may be offered to prove causation under Article 25. In that case, the plaintiffs did have a specific theory as to how the crew's misconduct had caused the aircraft to be shot down and they did not argue that Korean Airlines should be found liable no matter how the disaster occurred.[3] *See* 932 F.2d at 1478-81.

Plaintiffs and the court below ignore the point that the disparate acts introduced here to prove causation either had nothing to do at all with Flight 103 or no link to any specific theory of causation, such as the Air Malta theory.[4] Under the rubric of "totality of the circumstances," the court below has eliminated the requirement that plaintiffs must prove that specific acts of wilful misconduct caused the crash.

C. The Appellate Fact-Finding. The court below held that it was "harmless error" to allow plaintiffs to brand as a lie Pan Am's claim that the FAA had approved the

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[3] Moreover, the carrier in that case was unable "to suggest an innocent explanation for the disaster." 932 F.2d at 1481. Here, in contrast, the courts below precluded Pan Am's efforts, through its own witnesses and through cross-examination of plaintiffs' experts, to suggest ways in which the bomb might have been planted for which Pan Am would not be responsible (App. 31a-34a).

[4] Plaintiffs add confusion by asserting that "other wrongs or acts" are admissible to prove "motive, intent, plan, or knowledge" (Opp. 29). Pan Am objected to the evidence on two grounds—its relevance to "motive, intent, plan, or knowledge" and its relevance on causation (*e.g.*, J.A. 406-08). The trial court overruled both objections (J.A. 1439-43), and thus did not give a limiting instruction (*see Huddleston* v. *United States*, 485 U.S. 681, 691-92 (1988)) that would have prevented plaintiffs from urging the jury to conclude that the carrier should be deemed responsible "however [the bomb] bag got on the airplane" (J.A. 3529). Moreover, contrary to plaintiffs, *Tug Ocean Prince, Inc.* v. *United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979), does not support the admission of plaintiffs' evidence of misconduct not related to the Air Malta theory. In *Tug Ocean Prince*, the "totality of the circumstances" consisted of multiple acts by defendant, each of which was shown to be causally related to the accident.

x-ray procedure, while preventing Pan Am from presenting the factual basis for its position and even barring the alleged liar from meeting the charge. In support of its harmless error ruling, the majority purported to find "overwhelming evidence" (App. 21a) of wilful misconduct in other episodes. Characterizing these other incidents as proof of wilful misconduct required the court below to reject Pan Am's testimony showing that the carrier had taken special security steps in response to the Helsinki warning, that the x-ray operator had searched for radios in light of the Toshiba warning,[5] that, contrary to a security consulting firm, the British government had approved the x-ray screening of unaccompanied bags,[6] and that the alleged backdater of the Helsinki warning did not backdate (Pet. 23-25).

Plaintiffs' only response is that it is "nonsense" to say that "the court of appeals resolved disputed questions of fact in derogation of the rights of trial by jury" (Opp. 30). But there is no attempt to rebut Pan Am's factual demonstration that the court of appeals did usurp the jury's function. Review by this Court is warranted because the safeguards provided by rehearing en banc and

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[5] Plaintiffs' assertion (Opp. 13) that Kurt Maier, the x-ray operator for Flight 103, was not given the Toshiba warning is contradicted by Maier's testimony at trial (J.A. 3382-83). They also argue (Opp. 13 & n.17) that Maier "recanted" his testimony that there was no radio in the bags x-rayed for Flight 103, but at trial Maier was asked: "Were there any radios in those things that you x-rayed?" and he answered: "No" (J.A. 3392-93). Plaintiffs' claim that Maier "recanted" this testimony is based on a rewriting of his testimony on cross-examination. Significantly, when arguing before the jury that had heard all of Maier's testimony, plaintiffs did not place this revisionist interpretation on Maier's testimony.

[6] In a burst of invention, plaintiffs claim that Pan Am violated the British regulations by not matching passengers and bags (Opp. 23-24). James Jack, the Principal Aviation Security Advisor for the British Department of Transport, answered "No" when asked: "Were any rules or regulations in effect on December 21, 1988, that required foreign air carriers to match each bag with a passenger that was on a particular flight" (J.A. 289).

review by this Court are impaired when appellate panels insulate important and erroneous rulings of law from further review through result-oriented fact-finding.

D. Plaintiffs' Treatment of the Evidence. The rulings presented by questions 1 and 2 of the petition are rulings of law that drain Article 25 of the Warsaw Convention of its meaning. This Court is being asked to reinstate the correct legal standards under Article 25 and to direct the court of appeals to apply those standards to this record. Thus, there is no occasion now, or on the merits, for the Court ever to entertain the jury argument that plaintiffs have presented in the first 24 pages of their opposition.[7]

Moreover, plaintiffs' rehash of their closing argument highlights the basic unfairness of the trial. Here, the jury was precluded from hearing evidence showing Pan Am's state of mind in adopting and implementing the x-ray procedure, evidence showing that British security officials had approved x-ray as the means for detecting terrorist bombs in unaccompanied bags, and all expert evidence regarding terrorism or bombing. The unfairness of the trial in this case is not in any respect diminished by plaintiffs' point that Pan Am did not file a Rule 50 motion contesting the sufficiency of plaintiffs' evidence because the problem is that the trial court did not allow Pan Am to present its own case on state of mind and did not confine plaintiffs' case to proper evidence on causation.[8] If

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[7] Parts of plaintiffs' argument have no evidentiary support at all. Plaintiffs claim that unaccompanied interline bags represent the "greatest danger" of bombing (Opp. 10). The courts below, however, excluded Pan Am's expert evidence that the greatest danger actually comes from passengers who serve as unwitting couriers of bombs, a bombing technique utterly inconsistent with the Air Malta theory. The trial judge instead instructed the jury that there was "no evidence" to support the very assertion plaintiffs make here (App. 26a).

[8] There is, of course, no requirement that a party move under Rule 50 as a condition for appealing the use of erroneous legal standards in admitting and excluding evidence. *See, e.g., Kotteakos*

those prejudicial errors had not been committed, Pan Am would likely have prevailed in the trial of this case; for, despite the one-sided rulings that crippled Pan Am's intended defense, the jury twice reported itself deadlocked before reaching its verdict.

E. The Proffer. Plaintiffs argue that Pan Am failed to make an offer of proof regarding the evidence that it had received approval from the FAA to implement the x-ray procedure. They made the same argument to the court of appeals, but that court announced the legal rulings now challenged, while "assuming without deciding that defendants sufficiently preserved their objection . . ." (App. 16a-17a). Thus, the judgment below and the standards announced by the court below are squarely presented to this Court.

Furthermore, the facts set out in note 20 of the petition and in the dissenting opinion spike any challenge to the sufficiency of Pan Am's proffer. For instance, while the majority below (App. 14a) stated that Richard Cozzi's proffered testimony was inadmissible hearsay (Opp. 18), that is plainly wrong. Counsel for Pan Am responded to a hearsay objection by stating that Cozzi's testimony was being proffered to show the state of mind of Pan Am's management when it adopted the x-ray procedure: "Your Honor, the state of mind is at issue here" (App. 50a). As the dissent demonstrated,[9] when introduced for that purpose, Cozzi's testimony was *not* inadmissible hearsay.

While the majority below was prepared to assume that the proffer on Daniel Sonesen's proposed testimony was

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v. *United States*, 328 U.S. 750, 765 (1946) ("The inquiry [in determining prejudicial error] cannot be merely whether there was enough to support the result . . . .").

[9] App. 64a-66a, *quoting, e.g., United States* v. *Rubin*, 591 F.2d 278, 283 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). *See also* 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 801(c)[01], at 801-94 to -99 (1994).

adequate, the dissent, to remove any doubts whatsoever, quoted the first proffer of Sonesen's testimony that was made *in writing* (App. 68a), and quoted many of the oral proffers made by Pan Am's counsel during the trial (App. 48a-50a, 70a-79a). Further, in a brief submitted during the trial, Pan Am for the second time set out *in writing* the substance of Sonesen's proposed testimony (J.A. 410). Plainly, nothing more is required.[10]

In sum, new rules were announced by the court of appeals in justifying the exclusion of Pan Am's defense, and the record shows that the rejected defense was squarely presented to the trial judge.[11] Indeed, that defense was proffered so often that the trial judge complained that he was rejecting it for the "425th time" (App. 83a).

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[10] Rule 103, Fed. R. Evid., only requires that the "substance" of the excluded evidence be "made known" to the trial judge, unless that judge directs that a proposed witness be called and make his proffer from the witness stand, which the district court did not do here.

[11] Plaintiffs' remaining attacks on Sonesen's proposed testimony, *i.e.*, that it is too vague or contradictory (Opp. 18-19, 27), go to credibility and weight, and not to admissibility. (Their attacks also ignore Cozzi's crisp recollection of the facts, which corroborates Sonesen's proffered testimony.) Plainly, unless defendants are to be stripped of their right to jury trial, a court does not have a "right to reject testimony dealing with a person's state of mind because it deems the testimony incredible or lacking in persuasive force" (App. 66a). *See Cheek* v. *United States*, 498 U.S. 192, 203 (1991).

CONCLUSION

A writ of certiorari should issue to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

Respectfully submitted,

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